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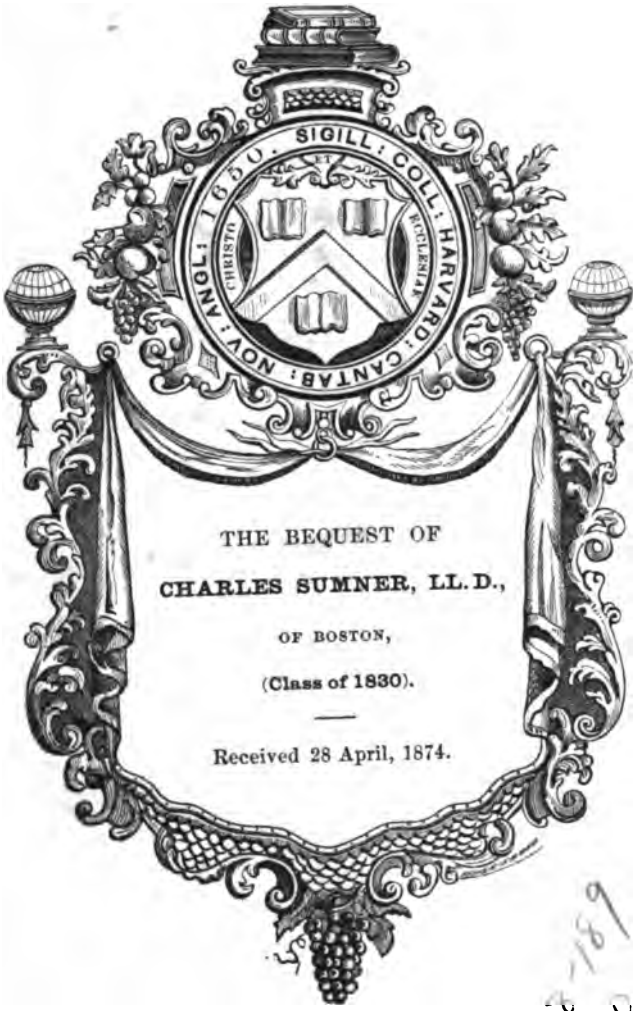

THE BEQUEST OF

CHARLES SUMNER, LL.D.,

OF BOSTON,

(Class of 1830).

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COMPENDIUM

OF

MODERN CIVIL LAW.

BY

FERDINAND MACKELDEY,

PROF. OF LAW IN THE UNIV. OF BONN.

EDITED BY

PHILIP IGNATIUS KAUFMANN,

TO SUBSCRIBERS.

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PREFACE.

THE *Roman Law* is, properly speaking, the sum of all the legal regulations of the Roman people, at whatever time they may have existed or been in force. And in this its whole extent, it has often been and is still made a subject of profound study and investigation by European jurists. Yet when we speak of the Roman law as adopted in the greater part of Europe, we mean by it, not the entire Roman law in the aggregate, but the *Civil law* in the stricter sense in which the Romans termed their private law *jus civile*. And even the private law is received only in the form in which it is found in Justinian's collections,* which taken together we are accustomed to call simply *Corpus Juris Civilis;* so that the private law before and after Justinian, their whole public and criminal law, and also their rules of proceeding, are excluded from reception. It is very true that even these last are not without importance for the jurisprudence of modern Europe, since not a few of their principles and provisions have passed into the European systems of law. They however are only separate particulars, which have nothing to do with the whole body of those branches of law from which they are taken, and which, on account of the peculiar elements that composed the Roman people and state, do not admit of being transferred to nations whose body politic is of an entirely different character. The case is otherwise with a great part of their private law, which *in its essential principles*—with a comparatively few modifications, required by the changes of time and circumstances, and

* Comp. p. 84 seq., and what is said respecting the maxim "Quicquid non agnoscit glossa, nec agnoscit curia," in the Editor's note to § 78.

by individual wants and views,—possesses a universal character. Moreover, the private law of Justinian, in the course of its application in those countries where it is adopted as a subsidiary law, has undergone alterations in many particulars; since, independent of the changes introduced by the state legislatures, its provisions have been modified partly by theory and practice, and partly by the operation of the canon law, which contains many provisions concerning marriage and other matters of private law.

The term *modern* Roman law* therefore signifies the *still applicable* doctrines of the Roman private law in the form which was given to it under *Justinian*, and *with the later modifications* it has received from the canon law, from theory, and from the practice of courts in the course of its application. To this we have merely to add, by way of more accurately defining its boundaries, that: 1. Only those institutes of the private law are especially considered in it which are of Roman origin or at least were known to the Romans, and not others which (as exchange and many other contracts, state stock transactions, insurance, *pacta hereditaria*, joint tenancy of husband and wife, feudal and manorial relations, the modern rights of corporations, the modern laws of trade, commerce, &c.) are not of Roman origin, or which have been thoroughly changed, or from a mere germ have grown up into an extensive branch of law. 2. The term modern law also excludes all those institutions which (as e. g. slavery) are foreign to the legislation of modern Europe: though, on the other hand, it is necessary to the understanding of the whole system, that many matters should be detailed which have never been regarded in the practice of modern Europe; as for instance the principles that relate to the Roman distinction between *pacta* and *contractus*, to concubinage, *stipulatio*, &c. The exclusion of the theory of proceedings in civil cases arises partly from the fact alluded

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* This phrase is used by Mackeldey in the title of the Compendium. I have preferred, however, to substitute for it in this edition the term, "Modern Civil Law;" although in the course of the work, both are used promiscuously. The objection that every people possesses a civil law (private law) is no reason why the term should not be used to denote κατ' ἐξοχήν the civil law of the Romans. The term Roman law is then less precise than Civil law; since the former comprehends not only the private law, but likewise all the other parts of the law of that people. It would certainly be more exact to call it the *Civil law of Justinian in its modern application*; but for all practical purposes, the briefer term *modern Civil law* is sufficiently perspicuous.

to already, viz. that the Roman rules of proceeding have never been adopted as a whole,—and partly from the custom, now generally followed, of dividing jurisprudence, like all other sciences, into its essential parts, and treating each of them separately.*

Having thus defined the meaning and extent of the term *modern Civil law*, it will be proper for us to inquire into the value of this law, viz. whether the Roman law has any well grounded claims to be adopted, or at least to be studied.

It has been customary in those countries where it has been or still is in force as a subsidiary law, to exhibit only the bright side of the picture, in order to deceive the multitude and put a stop to open opposition. But all these laudations have not been able to do away with the impressions created by what is passing before the people's eyes, and in some countries by the experience of many successive generations. Such experience has shown that as a practical system of law it is wholly unadapted to modern times and circumstances, although its claims as a high scientific authority have been placed beyond the reach of doubt. Those therefore are entirely in error who restrict the value of its study to countries where it has had or still has the force of law,† and who regard it as unnecessary, unprofitable, and useless, where the laws are codified or where the civil law has never received the force of a subsidiary law. In our opinion, on the contrary, the fruits to be obtained from the *study* of the Roman law, as a means of legal culture can be reaped to their full extent only in countries where it is *not* allowed the force of law.‡

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* The following classification of the different branches of our science I consider as on the whole the most appropriate, viz.: I. *Introductory studies.* 1. Encyclopedia and methodology of legal science; 2. History of the domestic law; 3. Philosophy of law, or law of nature.—II. *Ordinary studies.* 1. Domestic public law, and law of nations; 2. Domestic private law; 3. Roman private law, together with its history and exegesis; 4. Civil proceedings and extrajudicial civil practice; 5. Criminal law; 6. Criminal proceedings. — III. *Higher legal studies.* 1. Comparative jurisprudence; 2. The science of legislation.—IV. *Auxiliary studies.* Forensic eloquence; psychology; political economy; statistics, &c.

† I perfectly agree with *Brandtke* (Vindiciæ Juris Romani Justinianei. Breslau, 1808. p. viii.) in his declaration that: "Studiosus juris universi, scientiarum omnium præstantissimæ, immo quicunque operam dat *codici, cujusvis populi*, corpus Justinianeum, cujus auxilio ad veram cognitionem perventurus sit, evolvat necesse est."

‡ To the same effect Prof. *Mayer* (in his treatise, Ueber Römisches Recht und neue Gesetzgebung. Tubingen, 1839. p. 32.) remarks, in reference to the study of the

The importance which we attach to its study, can be justified by a reference to its many excellent provisions, and more especially to the classic mode in which its principles are laid down by the Roman jurists ;* while an additional inducement is offered by the

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Roman law in Germany: "When its provisions shall have ceased to have the force of law, its study will produce greater fruits, and the peculiar method employed by the so-called classical jurists in treating the law will be better estimated and turned to practical account." Like views are expressed by Prof. *Falck*, in his Preface to the 1st vol. of Colditz's German Translation of Blackstone's Comm., p. LI—LIII., and by Prof. *Beseler* (in his Inaugural Address, Ueber die Stellung des röm. Rechts zu dem nationalen Recht der germanischen Völker. Basle, 1836. p. 12 seqq.). "Had we attempted," says the latter, "to master the *art* of the Roman jurists, to thoroughly explore what is sound in the ancient Roman law, and to ascertain what is injurious in the additions of ruder times; had the powers of that long period, thus strengthened by precept and example, been applied to the *national* law,—can it be doubted that its regeneration would have been happily effected? But a different course was adopted. Most of the Germanic nations, who required assistance in struggling through a dangerous crisis of their development, had this foreign law thrust upon them, not as a model, but as a direct source of law; and Europe still suffers from the consequences of this unnatural union. England alone succeeded, after a protracted struggle, in subduing the political elements of the Germanic middle ages, which most other nations were unable to cope with, and in raising upon them the lofty and elaborate structure of the English constitution. A support was thereby obtained for the national law; and thus the Roman code, as a body of subsidiary law, was kept off the free soil of England, whereby at the same time those injurious effects were warded off from the constitution which every where else followed its reception. From the constitution of England no unprejudiced man can withhold his admiration. Yet the English law, considered in itself, is far from having attained an equal completeness; and the remedy for the imperfections under which it labours, is to be found *in the use of the ancient spirit as a model*. The English law consists of an enormous and partly shapeless mass of materials, to the mastering of which the whole force of mind and sound sense of this distinguished nation must be devoted: and this certainly will be done; for they have constantly shown, in the most admirable manner, that they know not only how to preserve, but also how to purify and improve it." The motions which were made for this purpose by Lord Brougham in the House of Lords, on the 13th of May, 1844, it is hoped will not be without effect in awakening attention to this subject.

* With regard to their method of treatment, the writings of the Roman jurists form a model hitherto unapproached. In their conception and representation of the facts of a case, as well as of the principles of law to be applied to it, they pursue the abstract into all its concrete applications, and point out with a marvellous sagacity, brevity, and felicity of expression, the bearing which all the particulars have on general legal principles:—a method worthy of our profoundest study and meditation. One of the finest encomiums on the classical jurists is that pronounced by *Prof. Mayer*, l. c. p. 28 seqq. He says: "It ought ever to be remembered, that it is not the amount of knowledge, but the inventive genius and the art of applying the principles of law to the relations of life, that make the true lawyer. Without this art, a body of laws, however copious, would often fail to furnish a sufficient legal rule; and jurisprudence, to a considerable extent, would fall short of its aim. Both the conditions upon which the art depends, viz. a thorough knowledge of law as a science, and the capacity of applying legal princi-

fact that it forms a key to the law of all the civilized nations of the present day; since their jurisprudence and legislation have borrowed many legal institutes from the Roman law, or have developed their own under its influence and imbibed much of its spirit. But what enhances incalculably the value of this study, is that the results of later ages are combined with the Roman law; and that it thus offers for our instruction the views and experience of many centuries. A science cannot and should not be confined within the boundaries of a single country; its essential principles are not the property of a single people or a single age, but belong in common to all nations and to all times. We perceive this most evidently in the so-called general or natural sciences,* and in the arts allied to them; especially at the present time, when the constantly increasing intercourse between one country and another fills the soul with the strong and pleasurable conviction, that nations as well as individuals are all members of one great family.

The intimate relationship that exists between the Civil and Common law has long been universally acknowledged. Most of the teachings of the latter bear more or less palpably the mark of their

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ples and deriving new rules from them, we find admirably fulfilled in the case of the Roman jurists. Familiar as they were with all the culture of their times, they knew the law not as an aggregate of rules, but in its scientific unity, such as it was disclosed to them by its own history and the history of their nation. Thus qualified, and engaged in public activity in all the paths of civil life, they understood how to make life and science harmonize with each other; they readily perceived what life demanded of science, and how to advance science without overlooking the just claims of life. With instinctive skill they first elicit the essence from the matter in hand, then reunite them with the greatest care and circumspection, and finally spiritualize and remould the material, so that it proceeds out of their hands as it were in new and multiplied forms. The legal literature of no other nation can show a casuistry so thoroughly spiritual, where the matter of fact only seems designed to corporealize and exhibit the spirit. Hence there is no better means for the training of practitioners than the study of the Pandects," &c. Comp. also the remarks made by Prof. *Falck* (l. c. Vol. I. p. LI—LIII.) on this subject, where he at the same time delivers his opinion of Blackstone's Commentaries, heartily concurring in the eulogiums so generally and deservedly bestowed on that masterly performance.

* But this is likewise true of all others; and consequently in the so-called special sciences, no partiality should be suffered to have place, but every effort should be made to arrive at perfection. Theology, for instance, when regarded from an elevated point of view, is also a general science; for among all nations it seeks after a knowledge of the Supreme Being, and of the relations borne to Him by man, and consequently it should have regard to the teachings and experience of other nations as a valuable test and an important aid to its investigations.—Not otherwise is it with the science of law.

descent or relationship; and there is perhaps no one of any importance on which at least the spirit of the Roman law and the fruits of its study have not had an influence of some sort. The student of the Common law should therefore devote himself to a thorough examination of the Civil law: partly in order to recognise the Roman element as far as it has been adopted, and, by tracing it up to its origin and its place in the system of the Romans, to facilitate the understanding of it and arrive at a correct perception of its application in the new sphere into which it has been introduced; and partly, in order to supply and improve whatever may be deficient or faulty in the rules thus borrowed. But by far the most valuable fruit of this study will be found in the beneficial influence which it is calculated to exert upon legal instruction and literature, especially by exalting the standard of legal culture. For the elevated views that pervade the Roman law and the profound insight which its study furnishes into law as a science, and into all the legal systems and codes founded on it, lead to a knowledge of the origin and connexion of legal institutes, and to their progressive attainment of the form in which they now exist; and thus they preserve the mind of the student from the contracting effects of the daily routine of business, and inspire him with the generous desire to serve his country and mankind, by endeavouring to bring the noble science to which he has devoted himself somewhat nearer to perfection.

The high value therefore which is set upon the study of the Civil law is not to be regarded as exaggerated, because out of the whole legal system of the Romans only the private law is to us of practical importance. For what is now termed the law of Pandects or Roman private law, is, as *Thibaut* has very truly observed (System. 8th Ed. § 4. Comp. also Editor's note to § 112.), scarcely any thing else than a system of general legal principles; since the whole law of obligations and of the rights of things is almost of equal importance in the relations between state and state, and between citizen and state, as it is in those between citizen and citizen.

And let it not be objected to this recommendation of the study of the Roman law as a means of instruction, that it belongs to a period so long passed away, in which governments and laws were less perfect, and science in a less advanced condition than at present. For as little as the study of ancient art, when properly

understood, is designed to lead to a mere copying of the works of antiquity for the purposes of our age, so little should the study of the Roman law be pursued with the idea of recalling the dead to life—of reinstating the legal condition of the Roman empire. We wish merely to collect the useful fragments that remain of those noble pillars of their legal system, the principles of their private law—as a model for study and reflection. Our object therefore is to master not so much the matter as the spirit of the Roman law; to draw from it valuable scientific results; to attain that incomparable art of tracing legal principles and that masterly method of applying them to practical cases, which are peculiar to the writers of the Pandects, and to which none have so closely approximated as the great practitioners of the English law.

Jeremy Bentham, in contrasting with a well ordered code the rude and informal shape which the English Common law has assumed, says of the latter that it unites in itself all the qualities of an inaccessible, uncertain, and doubtful system of law. Now this is certainly true in a tenfold degree of the Roman law, wherever it is adopted as a system of practical law; but where merely its study and its use as a scientific authority are in question, no fear can be more groundless than to apprehend that these should have any injurious effect, or make the state of things worse than it perhaps is already. On the contrary, from the high degree of perfection which the theory of the Civil law has attained, after passing through the purifying processes of centuries, it may confidently be anticipated, that its present scientific mode of treatment will exert a most salutary influence upon that of the English Common law.*

We do not, however, by any means claim that the Roman law is entitled to the appellation of *ratio scripta*. No such thing will ever be found. Nay, it cannot be considered as "written reason" even in the sense that it constitutes a system of principles adapted

* It cannot be doubted that the spread of the knowledge of the Civil law will produce this most desirable result;—a view which can be justified by referring to the older legal history of England herself. "With the middle of the twelfth century," says *Falck*, l. c. p. XXV., "begins in England, as in most other countries of Europe, the influence of scientific studies and of juridical literature on the domestic law. In England, too, the knowledge of the Roman law seems to have given the first impulse to a scientific treatment of the national law."

to the wants of our own times.* However excellent may be the cognizable abstract principles of law, it is nothing but a wild fancy for the extollers of Justinian's law to claim for it such a universal character with respect to all ages and nations, or for the ultra advocates of codification to insist that such a law can ever be realized. No one will deny that the Civil law contains a multitude of sound germs which have been developed in the true spirit of justice and equity; still there would be little wisdom in following its blind admirers, and regarding all its provisions as of unrivalled excellence. The true jurist must every where and at all times consider it his task to protect, as the most precious jewel, the *national* element of the law of his country, and at the same time to use his best exertions, whether as practitioner, author, or legislator, to elevate the actual law of the land to a higher general standard, and to this end he ought to avail himself of the best lights which experience can furnish, whether these come from a foreign or native source. Hence we insist upon our motto: *No nation should ever subject itself to any other law than its own; but the study of the laws of ancient Rome should in no nation be neglected.*

It remains for us to give some account of the life and writings of Mackeldey, and in particular of the history, objects, and merits of this Compendium, and our own labours and leading views in editing it.

Ferdinand Mackeldey was born in Brunswick, the capital of the duchy of that name (which is also the native country of the Editor), on the 5th of November, 1784. He received the rudiments of his classical education in the gymnasium of that city.

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* "Laws and institutions (to speak with *Jefferson*) must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times." Many distinguished jurists of both hemispheres have indeed frequently asserted that the Civil law constitutes a body of "*raison écrite.*" But after making the necessary deduction for exaggeration, nothing more remains to be admitted than that it has been and still is regarded and used as a universal fountain of law, *as far as its principles are found to be adapted to the modern state of things.* We are here reminded of what is said on this subject by Thibaut: "The principles of the Roman law, as of every positive law, are not of a uniform value; many arose from equitable and liberal sentiments, while on the other hand many are dictated by a spirit of severity and despotism."

He continued his studies in the pedagogium of Helmstedt, a small town situate a few miles from Brunswick, which dates its origin from the tenth century, and now contains about seven thousand inhabitants. He afterwards proceeded, in order to complete his preparation for the academical course, to the Collegium Carolinum.

In this lyceum,* a connexion with which as à student the Editor always remembers with gratitude, there are from fifteen to twenty professors for the different departments. Its object is to form a connecting link between the gymnasium and the university, by furnishing general instruction in philosophy and philology and introductory courses for the several faculties. Before the French or so-called Westphalian usurpation, a great many foreigners were attracted thither by the fame of the institution; but since that time, the number of students, consisting mostly of natives of the city of Brunswick, has usually been confined to from one hundred to one hundred and fifty.† The diminished resort to this insti-

* In Germany, as is well known, the successive steps of a liberal education are conducted through the gymnasium, the lyceum, and the university. The gymnasia and lyceums serve for the preparatory, and the universities for the finishing courses. Except in the south of Germany, the lyceums are every where decreasing in number, and indeed have become nearly superfluous; since the upper classes of the gymnasia, as now constituted, can very well supply their place. The preparation in the gymnasium for the study of a learned profession in the university, commonly requires from eight to twelve years; while to the study of the profession itself in the university only three years are usually devoted. With perhaps the exception of Austria and Bavaria, the prevailing spirit in the gymnasia, thanks to the leniency of discipline and the feeling of independence inseparable from high mental culture, is sound and vigorous; and it is only to be lamented that the plan of instruction is too exclusively occupied with classical studies, to the neglect of other not less important branches.

† From 1807 to 1814, the duchy of Brunswick formed a department of the French Kingdom of Westphalia, with a prefect at its head, whose residence was in the city of Brunswick. As in the other countries incorporated into this kingdom, so in Brunswick the French civil and criminal Codes were introduced, together with public and oral proceedings; all special and privileged jurisdictions were abolished; and the manorial burdens resting upon the peasantry were either removed or declared commutable. The general laws enacted for the kingdom were promulgated through a law-bulletin in the French and German languages. After the battle of Leipsic, Duke Frederick William returned to Brunswick; and as early as January, 1814, he put an end to the prefecture and the use of the French Codes, annulled the system of civil procedure and judicial organization introduced by the Westphalian government, and restored the state of the law which existed before the occupation of the duchy. Of all the innovations of the French, nothing was retained but the Westphalian system of taxation, because it secured a large revenue, and the abolition of the privileged jurisdictions, because

tution is no doubt chiefly to be ascribed to the considerable improvements which have of late been effected in the gymnasial institutions of northern Germany, and which have rendered the lyceums of less importance than formerly.

Mackeldey, thus prepared, returned at the age of eighteen to Helmstedt, in order to prosecute in the state university of that place the study of the science of law, which he had selected for his profession. In the year 1806, Mackeldey, having completed his academical course, obtained the degree of *doctor utriusque juris*. The treatise which according to custom he wrote for the occasion, was published under the title: Dissertatio inauguralis, quatenus actio *de recepto* contra aurigas et curatores mercium seu speditores competat. Helmstedt, 1806.; and it bore ample evidence to his practical talents and profound learning.

Following the bent of his inclinations, he entered the same year on the practice of law. Although in addition to his practical employments, he at the same time gave lectures as *privatim docens* in the university of Helmstedt, it was by no means his original intention to make academical instruction his profession; but he seems by so doing to have unconsciously revealed a presentiment of his future destiny, as brought about by circumstances over which he had no control. In the year 1807, without any previous sickness, he was suddenly afflicted with a hardness of hearing from which he was never afterwards relieved.* To this misfortune, which in itself formed a great impediment to the pursuit of practical business, were added the political occurrences of that period (see note. p. xiii.), which led to great changes in the administration of justice, and among them to the introduction

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this also favoured the government. That the university of Helmstedt (founded by duke Julius Sept. 15th 1576, and dissolved by the Westphalian government on the 10th of Dec. 1809, after two hundred and twenty-three years of honorable existence) was not restored, appears to have been owing to the early death of duke Frederick William (d. June 16, 1815), and to the fact that the country, on account of the minority of the hereditary prince Charles (now ex-duke, and the first German prince expelled by his people), fell during the years 1815–1823 under the tutelar government of the prince regent of England, afterwards king George IV.

* A number of years ago the Editor had an opportunity of conversing with some young jurists who had been pupils of Dr. Mackeldey in Bonn, in the later part of his life. While bestowing the highest praise on his admirable lectures, his many amiable qualities, and his happy talent for imparting instruction, they often mentioned the distressful feelings which his deafness occasioned to his auditors.

of public and oral instead of the former secret and written proceedings in the courts.

Thus Mackeldey saw himself compelled to forego his wish of devoting himself to practice in the courts, and to adopt the career of academical teacher as his future calling. The great applause bestowed upon his lectures as private instructor, the excellence of his personal character, and his profound scientific attainments, could not fail to procure him the favour and esteem of the members of the juridical faculty; and thus was opened the way to his appointment, as early as the year 1808, to a professorship of law in the university of Helmstedt. When in 1809 this institution was suppressed (see note. p. xiii), he was removed by the French government in the same year to the university of Marburg—a town in the electoral principality of Hesse-Cassel, then also incorporated into the temporary kingdom of Westphalia, situate between Cassel and Frankfort on the Main. In the year following he published, in connexion with Ed. Schrader (since highly celebrated as a civilian, and now professor of law in Tubingen), a brief view of the system of Justinian's Pandects after the plan of Hellfeld's Manual, under the title: *Ed. Schrader et Ferd. Mackeldey, Conspectus* Digestorum in ordinem redactorum ad Hellfeldii Jurisprudentiam forensem, etc. Helmstedt, 1810.

In the year 1811, Mackeldey was promoted to the rank of ordinary professor of law in the university of Marburg. It was in this year that he published his treatise entitled: Theorie der Erbfolge-Ordnung nach Napoleons Gesetzbuch. Marburg, 1811.

A brief pause now occurred in his literary publications, but only to distinguish more brilliantly the period of his residence at Marburg; for it was there he prepared for the press the work now offered to the public in an English dress. It did not make its appearance until the year 1814. I shall defer for the present any particular observations on this work, in order not to interrupt the account of his literary labours. I desire here merely to add that, although Mackeldey, by his previous writings and by his efficiency as a public teacher, had already procured for himself distinguished consideration, the appearance of the Compendium, in which the copiousness of his civil learning is displayed in such a masterly and pleasing manner, enhanced his reputation greatly; and indeed the numerous editions which were called for in rapid succession, show how completely his fame had become established.

He received in consequence, in the year 1819, a call to a professorship of law in the then newly established university of Bonn in Rhenish Prussia, which he accepted; and two years afterwards he was appointed president of the Collegium Juridicum* in that university. But at length, being desirous of devoting himself more inseparably and exclusively to the duties of his office and to his literary labours, he resigned the presidency, after having for seven years performed the functions attached to it. From that time forth his penetrating glance was turned to many different departments of legal science, as is shown by the number of writings he produced during the remaining seven years of his life; while his attention was also constantly directed to the improvement of the successive editions of his Compendium. Thus there issued from his pen, at brief intervals, the following writings: Grundriss zu Vorlesungen über gemeines Deutsches Lehnrecht. Bonn, 1828.—Dissertatio de *ordinum provincialium* in Germania origine. Bonn, 1832.—Rechtliche Erörterung der Frage: Ob der § 71.† der Kurhessischen Verfassungs-Urkunde, auch auf den Deputirten der Landes-Universität (Marburg) zu beziehen sei, oder nicht. (Pub. anonymously.) Bonn, 1833.—Grundriss zu Vorlesungen über den gemeinen Deutschen und Preussischen Civil-Process. Bonn, 1833.—Grundriss des Erbrechts. And Excurse über einzelne Rechtsmaterien. Bonn, 1835. —The last two writings were published shortly after his death, which took place October 20th 1834, just before completing his fiftieth year.

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* A body composed of the professors of the law faculty, for deciding questions submitted to them by the courts, and for giving counsel in difficult cases.

† This section of the Hessian constitution contains that famous privilege granted to the government in almost all the constitutions of the German states, by which the election of a public officer, whether lay or clerical, to the chamber of deputies must be communicated to the government for confirmation. In order to facilitate the swallowing of this bitter pill, the section is so worded as to make it seem necessary, in order that the government may provide for the temporary administration of the duties of the office; but for this purpose a simple intimation would of course be all-sufficient. And although it is said that the government can refuse such confirmation only for some weighty reason, long experience has shown how unwise it is to intrust the interpretation of a constitution to those whose interests are to be promoted by its perversion. Mackeldey, in the treatise above mentioned, propounds the question, whether the election of a professor, as a representative of the Marburg university at the diet, would need to be confirmed by the government.

We thus see that the investigations of Mackeldey were extended to many topics out of the Civil law. It is only to be regretted that death snatched him away so early from the field of his labours, and prevented him from carrying out the plan he had conceived of publishing a comprehensive manual of Pandects.* In August of the year 1833, he had signified his intention of bringing out the first part in the course of the following year. As far as the Editor knows, none of this work has as yet appeared; and it is to be presumed that the materials prepared for it were not, as had been hoped, sufficient to warrant their posthumous publication.

We proceed now to give a more specific account of the work before us. The present Compendium appeared originally under the title of *Lehrbuch der Institutionen des heutigen Römischen Rechts*, in the year 1814. The second edition, entirely rewritten, was published in 1818; and in it the title was changed to its present one of *Lehrbuch des heutigen Römischen Rechts*. The third edition, enlarged and improved, appeared in 1820. The fourth edition, revised and enlarged by the addition of the catalogue of Civil law literature (contained in pp. 101–119 vol. I. of the present edition), was divided into two volumes, the form which the work has since retained; it was published in the year 1822. The fifth edition appeared in 1823, and the sixth in 1825; both of them much improved and enlarged, but still retaining the system of Institutes adopted in the first. In the seventh edition, which appeared in 1827, the plan of Institutes was replaced by that system which will be found described in § 115; in the eighth edition, published in 1829, the doctrine of bankruptcy was appended. The ninth edition, revised and still further enlarged, appeared in 1831; the tenth, greatly improved, in 1833. The eleventh and twelfth editions were published after Mackeldey's death, in 1837 and 1842, under the

* The terms "Institutes" and "Pandects" (comp. p. xix, note *) have been rather improperly retained to the present day, to denote *systematic* lectures or works on the Civil law; when used in this sense, they signify nothing more than the elements or a complete exhibition of all the details of the Roman private law. Neither of these terms however must be understood as having any exclusive reference to Justinian's Institutes or Pandects; for the principles laid down in compendiums or lectures thus entitled, are drawn from the whole of Justinian's collections, and at the same time such earlier and later sources are consulted and referred to, as can contribute to confirm or explain the law of Justinian, or affect its application to modern times. See §§ 107–110, 115, and Editor's note to § 108.

superintendence of Dr. Rosshirt, professor of law in the university of Heidelberg.

The uncommonly favourable reception which this work of Mackeldey met with in Germany, soon attracted to it the attention of foreign jurists; and scarcely ten years had elapsed after its first publication, when a French translation of the Introduction appeared under the title: Introduction à l'étude du Droit Romain; traduite de l'allemand de M. F. Mackeldey, par M. L. Etienne. Paris, 1825. And again: Revue, augmentée, précédée d'un précis encyclopédique, et suivie d'une nouvelle restitution de la Loi des XII Tables et de l'Edit Perpetuel, par M. L. A. Warnkönig. Mons, 1826.

There also appeared a Spanish translation, based on the French one, and entitled: Introduccion al estudio del Derecho Romano estractado de los Elementos de Mackeldey, par D. L. Collantes Bustamente. Madrid, 1829. (With an Appendix on the Influence of the Roman Law on Spanish jurisprudence.)

Afterwards appeared also a French translation of the General and Special Parts, with the title of: Dr. F. Mackeldey, Manuel de Droit Romain. Traduit de l'allemand sur la 10me édition. Par Jules Beving. Brussels, 1837.

A complete translation of the entire work in the Russian language, edited by Nicol. Roshdestwensky, was published in two volumes, St. Petersburg, 1829 and '30, containing some additions relating to the Roman law in Russia.

A few years ago it also appeared in a Greek dress, under the title of: Φερδ. Μακκελδεῦ, Ἐνχειρίδιον τοῦ Ρωμαικοῦ δικαίου. Μεταφρασθὲν ἐκ τοῦ Γερμανικοῦ ὑπὸ Γ. Α. Ραλλη καὶ Μ. Ρενιερη. Athens, 1838.

To speak now of the original itself, every one who has had an opportunity of comparing the later with the earlier editions, and has remarked the numberless improvements, augmentations, and corrections in which they abound, must be convinced of Mackeldey's uncommon zeal for science and of his readiness to receive instruction. In this last respect it will be interesting to quote a sentence of Cujacius (Observ. lib. 2. cap. 37.), which Mackeldey chose for his motto and constantly bore in mind: "Utinam qui hoc tempore jus nostrum interpretantur, Papinianum imitati, quæ vel falso vel inepte aliquando et senserint et scripserint, ingenue retractent; nec eis, contra quam postea resciverint, tam obstinato tamque obfirmato animo (uti faciunt) perseverent."

Before 1814, there were but few *systematic* compendiums of Institutes.* The best among them were those of *Hofacker* and *Hugo;* but in practical utility, simplicity, and perspicuity, they are far excelled by Mackeldey's. He perceived what was needed by the teacher as a guide, by the student as a text-book, and by the practitioner as a compendious manual; and the want thus discovered he was able in the most satisfactory manner to supply. There already existed several good systematic compendiums of Pandects, and among them the masterly production of Thibaut, which Mackeldey could consult with advantage. Since that time there have appeared a great number of systematic compendiums both of Institutes and Pandects. Yet notwithstanding these rival publications, it may be asserted without fear of contradiction, that Mackeldey's work has only continued to increase in favour and general reception, and that no other manual of the Roman law was ever so widely adopted as a text-book by professors in the German universities. A good deal of this success was owing, among other excellencies of the work, to the circumstance that Mackeldey made it in the course of time (what the original plan of the work very well permitted) a medium between a compendium of Institutes and of Pandects, and thus set certain

* As early as the time of Justinian, it was customary to begin the study of law with the exegesis of the Institutes, which were especially designed for that purpose; and after this elementary instruction, the exegesis of Justinian's Pandects was taken up for the more thorough study of the details of the law (the *exegetical* legal method). The exegetical method, to which Justinian gave the sanction of law in his const. *Omnem reipubl.* (in Procem. Pand.), was retained by the glossators (see § 80, and Editor's note. p. 64 seq.), whose teachings in like manner consisted of elucidations of the text of Justinian's law-books; and in due time this method of legal instruction was transported from the Italian universities into those of other European countries. But at length the mastery of the immense mass of details in Justinian's collections was found to require too great an expenditure of time and labour, and to render perpetual references and comparisons necessary, for the purpose of bringing together all the scattered passages which belong to each subject. It consequently fell into disuse in the course of the 17th century. It was succeeded by the *dogmatical* method, according to which the laws themselves were no longer expounded, but their contents were taught; and this was effected by basing the instruction on text-books in which the principles and definitions contained in Justinian's collections were arranged according to their subjects. At first the compilers of such works were content to retain the order of the titles of Justinian's Institutes or Pandects (the *dogmatic* legal method). This however was soon seen to be a lame expedient; although it prepared the way for entirely abandoning the so-called legal method, and substituting the *systematic*, or as Domat calls it, the "*natural*" order. This method has become more and more common in later times; and since the end of the last century, it has been adopted in almost all compendiums.

bounds to the fulness of the details. This was not only beneficial to the student, furnishing him speedily and certainly with a knowledge of general principles; but it also recommended the work to the practitioner in ordinary cases, by the ease with which it was referred to. The Author's design was to present only the leading principles of Roman law in its modern application; and this he has accomplished, by means of an uncommonly perspicuous and simple mode of treatment.

But these very merits of the work have shocked many friends of the penchant, so common in Germany, for useless and unprofitable learning; who in their fondness for theorizing seem apprehensive lest antiquarian and learned topics should be divested of their mysterious sanctity, by being discussed in a common sense and intelligible manner. Such persons seem to imagine that the boundless ocean of science can best be explored when the adventurous navigator sets out on his voyage without chart or compass to direct him; and as they cannot conceive that a popular view of science can be other than superficial, it was not to be expected that Mackeldey's work would receive any favour at their hands.

It is our opinion, however, that the student who with the help of this Compendium easily acquires a clear and comprehensive idea of the grand features of the legal system of the Romans, will proceed with so much the greater zeal to conquer the inherent difficulties that attend the deeper study of the law sources, the commentators, and the other literature of the subject. It has been considered as barbarous by many, that Mackeldey has not given a more complete account of the ancient Roman law;* but on the

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* With regard to this, we think it interesting to make here a reference to Mackeldey's own remarks communicated to the late Prof. Thibaut, and alluded to by the latter in his article "On the so-called historical and non-historical schools" (published in the Archiv. Civ. Prax. Vol. 21. No. 3.), where Prof. Thibaut says: "The assertion that I was a contemner of legal history is a calumny which only the pitiable position of my adversaries and their still more pitiable aims and ends can enable me to comprehend. For it was I who, in 1808, commenced the Legal Annals of Heidelberg (Heidelberger Jahrbücher der Jurisprudenz und Staatswissenschaft. No. 1.) with a treatise in which I urged, that naked dogmatism should be generally abandoned; and the example set by me in my own lectures of Institutes and Pandects, in which since that time I have always endeavoured to illustrate every doctrine by references to internal legal history, has been followed by all the better academical teachers of law. *Mackeldey* indeed could never resolve to give up his purely dogmatic lectures, even though he acknowledged the great advantages of the method recommended by me. He wrote me to

whole this is clearly a merit in a book designed as an introduction to the study of the modern Roman law, and in which the fullest practical treatment of the materials demanded that the historical element should be made subordinate to its principal aim; still, wherever a sensible defect in this respect appears in the work, the Editor has endeavoured to supply it.

Among the upright jurisconsults of Germany, there are many, both theorists and practical men, who will cheerfully acknowledge that they have not only learnt much from the study of Mackeldey's book, but that even in cases of doubt and difficulty it is by no means the last to which they turn for information, advice, and authority. The simple fact that during a period of thirty years, twelve editions of the Compendium have been called for, gives a distinguished proof of its value; and this testimony is strengthened by the additional fact that it is used as a text-book in most of the German universities, that it forms a standard work of reference both for theory and practice, and lastly that it has been made the property of so many other nations.

In delivering this estimable work to the wide-spread nations that use the English tongue, it is scarcely necessary to remark, that it is designed not merely for students, but also for professional men. To the former, it will serve as a pleasant introduction to the wide domain of legal science; and the latter will not disdain to reap the advantages to be obtained from the study of another legal system, whose universal character gives it such great importance, and which is so intimately related to their own. A comparison of the two cannot but extend their views of the science of law in general, and even give them a profounder insight into many parts of their own law.

Although the observant reader cannot fail to ascertain the views which have guided the Editor in the plan and entire arrangement of the work, still some explanations on this point may here not be out of place.

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that effect, six years before his death; but at the same time he added that he felt compelled to abstain in his Compendium from discussing subjects of internal legal history; for, hardly dealt with and persecuted as he was, should he give such historical illustrations, he would run the risk of being so harrassed by his persecutors in their arrogance and self-conceit, that his life would be to him a burden. Of course I could not dispute the point with the noble-hearted man whom deafness had made so very diffident, especially as there was every probability that his fears were by no means groundless."

First of all, the Editor feels it his duty to give a brief account of the plan which he has followed in treating the original. The work now presented to the public, as will be seen from the title-page, lays claim to the character, not of a translation, but of an English *edition* of the German original. In a work of positive science, designed both for study and practical use, the narrow views of the mere translator are the surest means of rendering it impossible to truly nationalize a work composed in the language of another people. In transplanting the tree under another sky and into another soil, every thing must be done to ensure its being taken sound from its native bed, and also to consign it to its new abode with all the precautions necessary to its independent, prosperous, and fruitful growth. The Editor flatters himself that no one who thoroughly weighs the great additional amount of labour which he has imposed upon himself in diligently carrying out the views here expressed, will deny that the value of the work for its present sphere has been greatly enhanced. In the *text*, the Editor has permitted himself to make as few alterations and insertions as possible; and wherever he has added any thing of his own, he has distinguished it from the original by the signature K. With the *notes of the original* (here printed in double columns) he felt himself compelled to use a somewhat greater freedom, and above all to revise and reduce to greater uniformity the observations contained therein, which had been gradually accumulated in the course of different editions, and to incorporate with them an extensive selection of passages from the Roman law sources not to be found in the original. Lastly, in *his own notes* (which run across the width of the page) the Editor has sought to elucidate more fully the doctrines laid down in the text by historical and dogmatical explanations; to correct errors and inadvertencies; to discuss controverted points; to furnish illustrations from the stand of legislation and comparative jurisprudence; to remove obscurities, by furnishing examples; and generally, to enliven the whole by freely discussing the topics presented. In this manner the size of the work (although made less obvious by the smallness of the type and the condensed style of printing) is increased by more than one half. This mode of proceeding seemed to be indispensable: because the numerous works at the command of the German jurists, and which are cited or referred to by Mackeldey in his notes, are almost wholly inaccessible to

American and English jurists; while the domestic literature of the Civil law is as yet very scanty. The sententious brevity with which the original is written, is owing in part to the expectation that the more specific and minute knowledge required would be obtained through academical lectures and other sources of information. The value of the work would therefore have been greatly diminished for the English public, had I not endeavoured to supply these deficiencies.

As regards the references to books and periodicals written in modern foreign languages, and which few can be supposed to have access to, there were three courses open to my choice: viz. either to omit them altogether, to select such of them as might seem the most important, or to retain them all as they stood. The reasons in favour of the last of these methods seemed to me so conclusive, that I have not hesitated to adopt it, regardless of the labour and expense which it involved. The design of these numerous references is to justify the principles and views presented in the text; to point out the concordant or discordant interpretations, arguments, and opinions of other civilians; and to indicate the sources from which a more intimate knowledge of the subject may be derived. The reflection that to many these references must be useless, could not induce me to withhold from the work that completeness which is of importance to those who wish to devote themselves to a deeper study of the literature of the Civil law; though it has caused me to be more sparing of my own additions to them than I otherwise would have been.

As many readers of the work will not be in possession of the sources of the Civil law, and as it is convenient to have at hand a selection of the most important passages in a correct text for the sake of comparison, I have felt that it would be no inconsiderable improvement, to incorporate into the book at least a good portion of the passages cited, and thus to fortify the text by letting the sources from which it is drawn speak for themselves. The excerpts from the Pandects will be found particularly copious, which cannot but be welcome from the fact that they constitute the true kernel of the Roman law; the Institutes on the contrary, as they are in almost every one's hand, I have quoted very sparingly. In this manner the veil which conceals from many this sanctuary of law will at once be withdrawn; and the student will not only become acquainted with the abstract principles of Roman law as

laid down in modern compendiums, but will be enabled to test these principles for himself; and thus obtain a profounder and more independent knowledge of the subject.

As regards what had already been effected by *Dr. Rosshirt* in preparing the last German edition for the press, all those who are acquainted with the difficulty of conscientiously editing a scientific text-book prepared by another hand, cannot but award him the sincerest commendation for his successful efforts to bring the book nearer to perfection. The twelfth edition, published under the supervision of Dr. R., I have made the basis of my own; although I have felt compelled to deviate from this edition and to return to the last one published by Mackeldey himself, wherever Dr. R.'s alterations or omissions seemed to me faulty or not fully adapted to the spirit and plan of the Compendium. The order of the original I have in general closely adhered to; but while I have preserved the division into sections as nearly as practicable, I have adopted a simple and regular numbering throughout, in place of the confused one which had arisen in the course of the numerous editions which the original has gone through.

There remains for me only to render my acknowledgments to that eminent philologist, Mr. *William W. Turner*, and to my friend *John Moffat*, Esq. for the efficient assistance they have lent me towards the accomplishment of my performance; and to give public expression to my feelings of gratitude towards my distinguished patrons and friends both here and abroad for the many favours which their uncommon kindness has conferred upon me.

Trusting that it will form a not unimportant addition to the literature of the Roman law already extant in the English language, and that it will tend to infuse higher views and a more scientific spirit into legal studies in general, I now commit the work to the reader's candid examination.

PHILIP I. KAUFMANN.

New-York, September 1, 1845.

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ABBREVIATIONS.

OF WORDS.

Arg.	=	argumento.	*Obs.*	=	Observatio.
const.	"	constitutio.	*Opusc.*	"	Opusculum, or opuscula.
fr.	"	fragmentum.	*pr.*	"	principium.
Diss.	"	Dissertatio.	*s. c.*	"	so-called.
J. or Inst.	"	Institutiones.	*tit.*	"	titulus.
L. or l.	"	Lex.	*v.*	"	vide, or voce.
l. c.	"	loco citato.	*X.*	"	Extra. (See Ed.'s note, p. 83.)
L. un.	"	Lex unica.	*Z.*	"	Zeitschrift (periodical).
Nov.	"	Novella.	*Zeit.*	"	Zeitung (paper).

OF TITLES.

Archiv Civ. Prax., or Civilist. Archiv. (See p. 118.)

Archiv Crim. R.—Neues Archiv des Criminalrechts. Ed. by Mittermaier and others. Heidelberg, since 1817.

Back, Hist. jur. (See p. 106.)

Berg, Beob. u. Rechtsfälle.—Juristische Beobachtungen und Rechtsfälle. 4 Vols. Hanover, 1802–9.

Berger, Oec. jur. (See p. 115.)

Bethmann-Hollweg, Process des sink. R. R. —Gerichtsverfassung und Process des sinkenden Röm. Reichs. Bonn, 1834.

Biener, Opusc. (See p. 117.)

Böcking, Inst. (See p. 111.)

Böhmer, Exerc. ad Pand. (See p. 115.)

Braun, Erört., or *Braun* zu Thibaut. (See p. 112.)

Buchholtz, Jur. Abh. (See p. 118.)

Bülow and *Hagemann*, Pract. Erört. (See p. 115.)

Burchardi, Gesch. u. Inst. (See p. 111.)

" St. u. R. Gesch. (See p. 108.)

Clossius, Hermen. (See p. 1.)

Cocceii, J. civ. controv. (See p. 115.)

Cujac. Opp. (See p. 102.)

Dabelow, Syst. or Handb. d. Civ. R. (See p. 112.)

Danz, Handb. des Deutsch. Priv. R.—Handbuch des Deutschen Privatrechts. 11 Vols. Stuttgart, 1800–36.

——, R. R. G. (See p. 108.)

Dirksen, Beitr. (See p. 117.)
——, Civ. Abh. (See p. 117.)
——, Verm. Schr. (See p. 28.)
Donellus, Comm. (See p. 114.)
Eckhardt, Hermen. jur. (See p. 102.)
Eichhorn, Deutsch. Priv. R. — Deutsches Privatrecht. 4th Ed. Gottingen, 1836.
———, R. G.—Deutsche Staats- und Rechts-Geschichte. 4 Vols. 4th Ed. Gottingen, 1834–36.
Elvers, Beitr.—Beiträge zur Rechtslehre und Rechtswissenschaft. Gottingen, 1820.
——, Jur. Z.—Allgemeine juristische Zeitung. Gottingen, since 1828.
——, Themis. (See p. 118.)
Falck, Encycl. — Juristische Encyclopädie. 4th Ed. Kiel, 1839.
Feuerbach, Civ. Vers. (See p. 116.)
Francke, Civ. Abh. (See p. 117.)
Fritz, Erläut., or *Fritz* zu Wening. (See p. 112.)
Gans, Syst. des Civ. R. (See p. 113.)
Gesterding, Irrthümer. (See p. 117.)
———, Nachforschungen. (See p. 117.)
Glück, Comm. (See p. 114.)
——, Einl. (See p. 1.)
——, zu Günther. (See p. 112.)
——, Opusc. (See p. 116.)
Göschen, Grundriss.—Grundriss zu Pandecten-Vorlesungen. Gottingen, 1827.
Gött. gel. Anz.–Göttinger gelehrte Anzeigen.
Gottschalk, Disc. forens. (See p. 116.)
Græv. Thes. (See p. 109.)
Guyet, Abh. (See p. 117.)
Haubold, Hist. jur. (See p. 106.)
———, Inst. jur. dogm.—Institutionum juris historico-dogmaticarum epitome. Leipsic, 1821.
———, Inst. lineam. (See p. 111.)
———, Inst. lit. (See p. 109.)
———, Pand. lineam. (See p. 98.)
Heineccius, Antiq. Rom. (See p. 107.)
———, Elem. (See p. 110.)
———, Hist. jur. (See p. 106.)
———, Recitt. in elem. (See p. 113.)
Heise and *Cropp*, Jur. Abh. (See p. 116.)
Hellfeld, J. P. forens. (See p. 112.)
Hofacker, Inst. (See p. 110.)
Hoffmann, E. E., Versuche.— Civilistische Versuche. Darmstadt, 1835.
Hommel, Rhaps. quæst. (See p. 115.)
Höpfner, Comm. (See p. 113.)
Hufeland, Beitr. (See p. 117.)
Hufeland, Geist des R. R. (See p. 117.)
———, Lehrb. d. Civ. R. (See p. 108.)
Hugo, Beitr. B. K.—Beiträge zur civilistischen Bücherkenntniss der letzten 40 Jahre. Berlin, 1828. '29.
——, Civ. Mag. (See p. 109.)
——, Encycl. (See p. 1.)
——, Ind. font.—Index fontium. (See p. 36.)
——, Inst. (See p. 111.)
——, Lit. Gesch. (See p. 109.)
Hugo, Pand.—Lehrbuch der Digesten. Berlin, 1828.
——, R. G. (See p. 108.)
——, R. G. s. J. (See p. 109.)
Huschke, Stud. (See p. 117.)
Kämmerer, Beitr. (See p. 117.)
Kind, Quæst. for. (See p. 115.)
Köchy, Civ. Erört.—Civilistische Erörterungen. Leipsic, 1811.
Konopack, Inst. (See p. 111.)
Krit. Jahrb. (See p. 119. Richter.)
Krit. Z. f. R. W., or Krit. Z. d. Ausl. (See p. 119.)
Kritz, Abh. (See p. 117.)
Langenn and *Kori*, Erört. (See p. 116.)
Lauterbach, Coll. (See p. 114.)
Linde, Z. or Zeitschrift. (See p. 118.)
Leyser, Medit. (See p. 115.)
Löhr's Mag. (See p. 118.)
Maciej., Princ. (See p. 111.)
Mag. f. R. W. u. G. (See p. 118. Grolman.)
Majansii Disputt. (See p. 118.)
Meerman, Thes. (See p. 118.)
Meier, Colleg. Argent. (See p. 114.)
Mevii Decis. (See p. 115.)
Mühlenbruch, Doctr. Pand. (See p. 113.)
———, Inst. (See p. 111.)
Müller, Civ, Abh. (See p. 118.)
——, Observ. (See p. 115.)
Neustetel and *Zimmern*, Untersuchungen. (See p. 117.)
Niebuhr, R. G. (See p. 105.)
Otto, Thes. (See p. 118.)
Pfeiffer, Pract. Ausf. (See p. 115.)
Puchta, G. F., Civ. Abh. (See p. 117.)
——, Inst. (See p. 108.)
——, Pand. (See p. 113.)
Puchta, W. H., Klagen. (See p. 187.)
Puffendorf, Observ. (See p. 115.)
Reinhard, Verm. Aufs. (See p. 117.)
Rhein. Mus. (See p. 109.)
Richter's Z. or Zeitschrift. (See p. 119.)
Rosshirt, Beitr.—Beiträge zum römischen

Recht und zum römisch-deutschen Criminalrecht. Nos. 1. and 2. Heidelberg, 1820 and '24.
——, Z. or Zeitschrift. (See p. 119.)
Sammet, Hermeneutik. (See p. 102.)
Savigny, R. R. im M. A. (See p. 109.)
——, System. (See p. 113.)
——, Z. or Zeitschrift. (See p. 109.)
Schilling, Bemerk. (See p. 108.)
Schöman, Handb. d. Civ. R. (See p. 118.)
Schrader, Abh. aus d. Civ. R. (See p. 116.)
——, Civ. Abh. (See p. 116.)
Schulting, (See p. 105.)
——, Comm. academ. (See p. 116.)
Schultz, R. St. W. (See p. 106.)
Schunck's Jahrb. (See p. 118.)
Schweppe's Jur. Mag. (See p. 117.)
——, R. Priv. R. (See p. 112.)
——, R. R. G. (See p. 108.)
Seuffert, Erört. (See p. 117.)
——, Pand. R. (See p. 113.)
Spangenberg, Einl. (See p. 1.)
Strube, R. B. (See p. 115.)
Struve, Synt. (See p. 114.)
Stryk, Us. Mod. (See p. 115.)
Themis. (See p. 118.)
Thibaut, Log. Ausl. (See p. 102.)
——, System. (See p. 112.)
——, Verjährung. (See p. 291.)
——, Versuche. (See p. 116.)
Tüb. krit. Z. (See p. 119.)
Unterholzner, Jur. Abh. (See p. 117.)
——, Verjährung. (See p. 291.)
——, Verjährungslehre. (See p. 291.)
Valett, Abh. (See p. 117.)
——, Lehrb. d. R. R. (See p. 113.)
Vangerow, Leitf. (See p. 115.)
Vinnii Quæst. (See p. 116.)
Voetii Comm. ad Pand. (See p. 114.)
Walter, G. R. R. (See p. 108.)
——, K. R. or Kirchenrecht. (See p. 138.)
Warnkönig, Comm. jur. Rom. (See p. 113.)
——, Inst. (See p. 111.)
——, zu Gibbon. (See p. 12. note *a*.)
Weber, Versuche. (See p. 116.)
——, zu Höpfner. (See p. 113.)
Welcker, Letzte Gründe. (See p. 5.)
Wening, Civ. R. (See p. 112.)
Wieling, Jurispr. rest.—Jurisprudentia restituta s. index chronologicus in totum juris Justin. corpus. Amsterdam, 1727.
Zachariä, K. S., Lib. Quæst. (See p. 146.)
Zachariä, Th. M., R. G. (See p. 106.)
Z. f. Civ. R. u. Proc. (Linde's, see p. 118.)
Z. f. Civ. u. Crim. R. or Rosshirt's Z. (See p. 119.)
Z. f. gesch. R. W., or Savigny's Z. (See p. 109.)
Zimmern, R. G. (See p. 108.)
——, Untersuchungen, or Röm.-rechtl. Unters. (See p. 117.)

INTRODUCTION.

FIRST DIVISION.*

DEFINITIONS OF LAW AND LEGAL SCIENCE.

I. Right and Law in General.

§ 1. RIGHT, in its general sense, is all that agrees with a *law*, that is, with a general rule which must necessarily be obeyed. A law is either *physical* (law of nature), as when it rests upon a necessity of nature, which excludes the possibility of any resistance; or *moral* (law of liberty), when it is founded upon a necessity of human reason, where contravention is possible, but forbidden. Physical laws, therefore, establish the rules of *physical* possibility and necessity of action (power and necessity), while moral laws establish the rules of *moral* possibility and necessity (freewill and obligation). Legal science is concerned only with moral laws that regulate the free conduct and action of man.[b]

(*a*) The following are among the most useful works to be consulted preparatory to the study of the Roman law: *Haubold*, Præcognita juris Romani. Leipsic, 1796.—Idem, Lineamenta institutionum jur. Romani. Edited by Otto. Leipsic, 1826.—*Hugo*, Encyclopädie. 7th Ed. Berlin, 1823; 8th Ed. 1835.—*Glück*, Einleitung in das Studium des Römischen Privatrechts. Erlangen, 1812.—*Spangenberg*, Einleitung in das Römisch-Justinianeische Rechtsbuch. Hanover, 1817.—*Mühlenbruch*, in the introduction to his Doctrina Pandectarum. 3d Ed. Halle, 1830.—*Warnkönig*, in the introduction to his Commentarii juris Romani privati. Liege, 1825.—Idem, Vorschule der Institutionen und Pandecten. Freiburg, 1839.—*Clossius*, Hermeneutik des Römischen Rechts. Riga and Dorpat, 1829.—*Schilling*, Institutionen und Geschichte des Römischen Privatrechts. No. 1. Leipsic, 1834.

(*b*) *Hugo*, Encyclopädie. 7th Ed. p. 9.—*Tittmann*, Handbuch für angehende Juristen. Halle, 1828. § 1–25.

* This Division would have been placed more correctly at the beginning of the General Part. The author of the Compendium was probably led to introduce it here, by a desire to give at once a few general definitions, before entering upon the exhibition of the subject at large. The Editor therefore reserves his remarks upon the contents of this Division, for the General Part; and at the same time he would refer the reader to his observations in the Preface.

II. Law in regard to Human Action.

§ 2. With regard to the free conduct of man, the word *jus* (moral law) has a double signification. 1. Jus (law) denotes, in its *objective* meaning, those *laws and rules* which men as rational beings, in their mutual relations, are to respect as the standards of their free actions (*jus est norma agendi;* jus is a rule of conduct). These laws and rules are *juridical*, when they establish rules which the inhabitants of a state may if necessary be compelled, through its public authorities, to observe; or *ethical*, when they consist merely of moral precepts, for the observance of which no coercion is practicable.[a] The voluntary conduct of man in conformity with the precepts of law, is called justice (*justitia*).[b] 2. Jus (right) in its *subjective* sense, means *the right to act*, viz. the moral license to act or demand (*jus est facultas agendi;* jus is a license to act). In this meaning it signifies, therefore, the favourable relation of one man to another, and in certain cases is denominated privilege.[c]

1. Jus, in its Objective Meaning.

A. Natural and Positive Law.

§ 3. Jus (law), in its *objective* meaning, is usually divided, according to its foundation, into natural and positive law. By *natural law*, is understood the law discoverable by, and derived from the abstract ideas of human reason, or the doctrine of the general and necessary conditions upon which the external liberty of each individual may comport with the liberty of a whole community.[d] *Positive law*, on the contrary, is the law established by historical facts, or the sum of those principles which are acknowledged in a state as principles of law, and consequently have authority as such.[e] In every state, general acknowledgment and observance form the foundation of all positive law; and upon it, in every nation, the character of the people, the manners, religion, form of government, and many incidental facts and events, exercise the greatest influence. This explains, on the one hand, the reason why

(*a*) *Hugo*, l. c. p. 9–14.

(*b*) pr. J. 1. 1. "*Justitia* est constans et perpetua voluntas jus suum cuique tribuendi."—fr. 1. pr. § 1. fr. 10. pr. D. 1. 1.

(*c*) E. g. the right of leading water through the grounds of another. pr. J. 2. 3.

(*d*) It is therefore sometimes called the *doctrine of philosophical law*, or *metaphysics of the law;* but it is by no means to be taken as synonymous with the *philosophy of positive law* (§ 9). For the different views in regard to natural law, see: *Falck*, Encyclopädie. 3d Ed. § 48–57.—*Baumbach*, Lehrbuch des Naturrechts, als einer volksthümlichen Rechtsphilosophie. Leipsic, 1823.—*F. J. Stahl*, die Philosophie des Rechts nach geschichtlicher Ansicht. Vols. 1, 2, 3. Heidelberg, 1830, 1834, 1837.

(*e*) The Romans called it *jus civile*, or *jus proprium civitatis*. § 1. J. 1. 2.—fr. 9. D. 1. 1. "Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur. Nam *quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est: vocaturque jus civile.*"

positive laws are dissimilar among different nations, whilst the natural law is every where one and the same; and, on the other hand, why the latter, on account of its being derived from reason, forms, and ought to form, the basis of every positive law.[a]

B. Sources of the Positive Law.

§ 4. The positive law of every nation rests, with respect to its *origin and sources*, partly upon explicit laws, dictated by the supreme power of the state (*jus quod ex scripto constat*), and partly upon usage and custom (*jus quod sine scripto venit*).[b]

a. *Explicit Law.*

§ 5. Law (*lex*), in its strict juridical meaning, is a precept given by the supreme power of the state, for its subjects to obey : it is founded, therefore, upon the will of the legislative power. In order to obtain its binding force, it is necessary that it be made known to those for the regulation of whose conduct it is intended. This publication of the law, which is made by the supreme power of the state, with the design of securing submission to it, is called *promulgatio legis*,[c] and may be effected in various ways. Laws have no binding force before their promulgation ; consequently, as a general rule, their effects extend only to the future, and not to the past (*lex nova ad præterita trahi nequit*).[d]

(*a*) § 11. J. 1. 2. "Sed naturalia quidem jura, quæ apud omnes gentes perœque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent. Ea vero, quæ ipsa sibi quæque civitas constituit, sæpe mutari solent, vel tacito consensu populi, vel alia lege postea lata." See also fr. 6. D. 1. 1.

(*b*) § 3. 9. J. 1. 2.—fr. 6. § 1. D. 1. 1. See below, § 113.

(*c*) In the times of the Republic, the Romans understood by "promulgare legem" to make the *proposal* of a law publicly known, to the end that every one might be able to take it into consideration, before it was voted upon in the *comitia*. See below, § 21. But Justinian uses the expression according to its present meaning. Procem. Inst. § 1. "Omnes vero populi legibus jam a nobis *promulgatis* vel compositis reguntur."

(*d*) const. 7. C. 1. 14.—Nov. 22. cap. 1.—Nov. 66. cap. 1. § 4.—cap. 2. 13. X. 1. 2.—The following works and articles are of importance to the literature of this subject: *Gönner*, Archiv für Gesetzgebung und Rechtswissenschaft. Vol. 1. No. 10.—*Chabot de l'Allier*, Questions transitoires. Paris, 1809. 2 Vols.—*Blondeau*, Zurückwirkende Kraft des Gesetzes. Transl. into the German from the French. Dusseldorf, 1810. Idem, in the Thémis. Vol. 7. p. 289.—*B. W. Pfeiffer*, Anwendung eines neuen Gesetzbuches, in the periodical entitled *Germanien*. Vol. 3. No. 16. Idem, Practische Ausführungen. Vol. 2. p. 385.—*A. D. Weber*, Rückanwendung positiver Gesetze. Hanover, 1811. —*Von Herrestorff*, Zurückwirkende Kraft der Gesetze. Dusseldorf, 1812; and improved under the title: Abhandlung über die Eigenheit der Gesetze in Ansehung der Zeiten. Frankfort, 1815.—*Zeller*, Rechtliche Wirkung neuer Gesetze die Güterverhältnisse und Erbschaften unter Eheleuten betreffend. Heilbron, 1812.—*J. D. Meyer*, Principes sur les Questions transitoires. Amsterd., 1813.—*Th. Wiesen*, Rückwirkende Kraft der Gesetze. Wetzlar, 1814.—*J.N. Borst*, Anwendung neuer Gesetze auf früher enstandene Rechtsverhältnisse. Bamberg, 1814.—*Ant. Bauer*, Gränzen der Anwendbarkeit des Code Napoleon auf die während seiner Gültigkeit in deutschen Ländern entstandenen Rechtsverhältnisse. Gottingen, 1814. (Reviewed by *Mackeldey*, in the Heidelberger Jahrbücher. No. 19.)—*F. Bergmann*, Verbot der rückwirkenden Kraft neuer Gesetze. Gottingen, 1818. —*Jordan*, Rückwirkende Kraft der Gesetze; in the Juristische Bibliothek. Vol. 1. p. 417.—*Georgii*, Rückanwendung neuer Gesetze; in the Archiv für die civilistische Praxis. Vol. 3. No. 12.—*F. Smits Verburg*, Diss. de lege in præteritum non revocanda. Liege,

b. *Law of Custom.*[a]

§ 6. No body of positive law depends merely upon the enactments of the legislative power. A great number of its maxims and principles originate and are formed, in all nations and at all times, by the opinions and manners of the people, by the decisions of the judges, and by scientific exertions for the elaboration and development of the law which already exists, as well as that which lives in the minds of the people.[b] Those legal rules which are not founded on explicit precepts of the legislature, but are introduced by public opinion and manners, are termed the *law of custom* or *usage*. A legal maxim of this kind, introduced and established by public opinion, habit, and custom, by the practice of courts, or by the jurists, has equal force with an explicit law.[c]

1823.—*N. D. Simonis* Diss. de jure civili haud retrahendo. Leyden, 1826.—*Merlin*, Repertoire universel. Vol. 16, art. "Effet retroactif." (An extract from this, made by *Jourdan*, is contained in the Thémis. Vol. 6. p. 441–463. Comp. also: *Blondeau*, in the same periodical. Vol. 7. p. 289.)—*Linde*, in his Zeitschrift für Civilrecht und Process. Vol. 5. p. 153.—*G. von Struve*, Anwendung neuer Gesetze. Gottingen, 1831.—*H. A. Zachariä*, Rückwirkende Kraft neuer Strafgesetze. Gottingen, 1834.

(*a*) The origin of the positive law itself has not been made a subject of inquiry by *Mackeldey*. Opinions on the subject differ greatly. *Puchta* and *Savigny* consider that customs are its foundation: in their opinion, the *laws* are nothing but a means of formally sanctioning the customs, and of developing them to a greater certainty and extent; and to the legal science, as represented by the profession, they assign the highest rank of all. *Other writers* consider the legislative power to be the representative of the will of the people, the primary source of the law; in their view, customs are merely a subsidiary source. To these older writers *Hugo* first opposed himself in his treatise entitled: Die Gesetze sind nicht die einzige Quelle der juristischen Wahrheiten (*Magazin*, Vol. 4. p. 87 seqq.); he, however, did not carry the doctrine as far as the school of Savigny.

(*b*) This view as to the origin of the positive law, was also entertained by the *Romans*. *Quintilian*, Inst. orat. 5. 3: "Pleraque in jure *non legibus, sed moribus* constant."—fr. 32. pr. D. 1. 3. "De quibus causis scriptis legibus non utimur, id custodiri oportet quod *moribus et consuetudine* inductum est."—fr. 33. ibid. "Diuturna consuetudo *pro jure et lege* in his quæ non ex scriptis descendunt, observari solet."—fr. 35. ibid. "Sed et ea quæ *longa consuetudine* comprobata sunt, velut tacita civium conventio, *non minus*, quam ea quæ scripta sunt jura, servantur."—fr. 40. ibid. "Omne jus aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo." Comp. also: Cod. 8. 53.—Among modern writers, this view is advocated with the greatest ability by *Hugo:* Encyclopädie. 7th Ed. p. 19. Philosophie des positiven Rechts. 4th Ed. § 153, 154. Civilistisches Magazin. Vol. 4. p. 114; and by *Savigny:* Beruf unserer Zeit für Gesetzgebung. Heidelberg, 1814. 2d Ed. 1828. (This work has been translated into English, under the title: On the Vocation of our Age for Legislation.) Comp. also: *Warnkönig*, Begründ. des Rechts durch eine Vernunftidee. Bonn, 1819. p. 25.—*Hinlopen*, Disp. de jure quod e moribus proficiscitur ipsius juris scripti fonte. Utrecht, 1800.—*Schrader*, Die prätorischen Edicte der Römer auf unsere Verhältnisse übertragen. Weimar, 1816. p. 5 et seqq.—*W. H. Puchta*, Das Institut der Schiedsrichter. Erlangen, 1823. p. 15 et seqq.—*Stahl*, Philosophie des Rechts. Vol. 2. Divis. 1. p. 137–145.—The same view is met with among the French: "Les codes des peuples se font avec le temps, mais à proprement parler on ne les fait pas," says *Portalis*, Disc. prélim. du premier projet de code civil, in the Conférence du Code civil. Paris, 1805. Vol. 1. p. 27.—Among the later writers, *Hepp* endeavours to maintain the contrary opinion, and to show that all positive law is derived from the declared will of the legislative power: in *Elvers* Allgemeine juristische Zeitung. 1830. No. 65–68.

(*c*) *Cicero* de invent. 2, 22. "*Consuetudinis jus* esse putatur, id quod voluntate omnium sine lege vetustas comprobavit."—*Ulpiani* Fragm. pr. § 4. "*Mores* sunt tacitus consensus populi longa consuetudine invecteratus."—§ 9. J. 1. 2. "Ex non scripto jus venit, quod usus comprobavit. Nam diuturni mores consensu utentium comprobati, *legem imitantur*."—fr. 32. § 1. D. 1. 3. "*Inveterata consuetudo pro lege non immerito* custoditur (et hoc est jus quod dicitur *moribus*

C. Preference of the Later Law.

§ 7. Since the law of a state is developed only by degrees, and undergoes frequent alterations in the lapse of time,[a] it follows as a matter of course that, with regard to its *validity and practical applicability*, the later law, whether it has been introduced by enactment or by custom, has the preference over the earlier.[b] This is expressed by the maxim, *Lex posterior* (better *jus posterius*) *derogat priori*.[c]

D. Public and Private Law.

§ 8. With respect to its *object*, all positive law may be divided into public and private law. The public law (*jus publicum*) comprehends those rules of law which relate to the constitution and government of the

constitutum). Nam cum ipsæ leges nulla alia ex causa nos teneant, quam quod judicio populi receptæ sunt; merito et ea, quæ sine ullo scripto populus probavit, tenebunt omnes. *Nam quid interest suffragio populus voluntatem suam declaret, an rebus ipsis et factis?* Quare rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur."—Customs must not, however, be contrary to reason, good manners, or the public weal. fr. 39. D. 1. 3. const. 2. C. 8. 53. Nov. 134. c. 1.—See, among the works that treat of the subject, especially the following: *Von dem Busche* de consuetudine. Gottingen, 1752.—*E. A. Haus*, Ueber den rechtlichen Werth des Gerichtsgebrauchs. Erlangen, 1789.—*Meurer*, Juristische Abhandlungen. Coll. 1. No. 4–6.—*Hugo*, Civilistisches Magazin. Vol. 4. p. 89.—*K. v. Grolman*, Ueber das Gewohnheitsrecht und den Gerichtsgebrauch; in his Magazin für die Philosophie des Rechts und der Gesetzgebung. Vol. 1. No. 2. p. 151.—*Guilleaume*, Abhandlung der Rechtslehre von der Gewohnheit. Osnabrug, 1801.—*Volkmar*, Theorie des Gewohnheitsrechts. Brunswick, 1806. — *Schöman*, Revision der Lehre vom Gewohnheitsrechte; in his Handbuch des Civilrechts. Vol. 1. p. 28. — *C. C. W. Klötzer*, Revision der Theorie vom Gewohnheitsrecht. Jena, 1813. — *Seuffert*, Erörterungen einzelner Lehren des röm. Privatrechts. Vol. 1. No. 5. — *Gesterding*, in the Archiv für die civilistische Praxis. Vol. 3. No. 18. — *Jordan*, Bemerkungen über den Gerichtsgebrauch; ibid. Vol. 8. p. 191. — *C. F. E. Schmidt*, Theorie des Gewohnheitsrechts. Leipsic, 1825. — *G. F. Puchta*, das Gewohnheitsrecht. Vol. 1. Erlangen, 1828. (Reviewed by *Unterholzner*, in the Tübinger kritische Zeitschrift. Vol. 5. p. 372.) Vol. 2. 1837. — *Jo. Christ. Kall*, Observat. de jure non scripto. Copenhagen, 1828. — *Vogel*, Untersuchungen über die Bestandtheile, Natur, und wissenschaftliche Stellung des Pandekten-Rechts. Leipsic, 1831. p. 72–78. — *W. Müller*, über die Natur des Gerichtsgebrauchs und dessen Gesetzeskraft; in his civilistische Abhandlungen. Giessen, 1833. No. 5. — *Savigny*, System des heutigen röm. Rechts. Vol. 1. §§ 12–15.

(*a*) § 11. J. 1. 2. "Ea vero, quæ ipsa sibi quæque civitas constituit, sæpe mutari solent, vel tacito consensu populi, vel alia postea lege lata."

(*b*) fr. 4. D. 1. 4. "Constitutiones tempore posteriores, potiores sunt his, quæ ipsas præcesserunt." — fr. 32. § 1. D. 1. 3. "Quare rectissime etiam illud receptum est, *ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.*" The preceding passage seems to be contradicted by const. 2. C. 8. 53. "Consuetudinis ususque longævi non vilis auctoritas est, verum non usque adeo sui valitura momento, ut aut rationem vincat *aut legem.*" But the words "aut legem" signify certainly no other than absolutely imperative laws, which, being supposed to make provisions required for the public good, are therefore not subject to a private change by the citizens; or, as it is expressed in the Roman Law: Jus publicum privatorum pactis mutari non potest. fr. 38. D. 2. 14. — fr. 3. D. 28. 1. — For the various ways of explaining const. 2. C. cit. see: *Franc. Car. Conradi* de consuetudine legem haud vincente. Helmstedt, 1745. — *Höpfner*, Commentar. § 58. — *Hübner*, Berichtigungen zu Höpf. Comm. p. 167.—*Schöman*, Handbuch des Civilrechts. Vol. 1. p. 56. — *Schweppe*, Handbuch des röm. Privatrechts. Vol. 1. § 34. — *Seuffert*, Erörterungen. No. 1. p. 28. — *Welcker*, Letzte Gründe von Recht, Staat, und Strafe. p. 510–514. — *Klötzer*, Gewohnheitsrecht. § 18.—*Schmidt*, Gewohnheitsrecht. § 25–28. — *Gesterding*, in the Archiv für civilistische Praxis. Vol. 3. p. 271. — *Schilling*, Bemerkungen über röm. Rechtsgeschichte. p. 392. — *Schweitzer* de desuetudine. Leipsic, 1801.—*Puchta*, Gewohnheitsrecht. Vol. 1. pp. 81–91. 117. 118.—*Savigny*, Pandecten. Vol. 1. p. 420.

(*c*) *Gönner*, Juristische Abhandlungen. Vol. 1. No. 3. Vol. 2. No. 35. — *Thibaut*, Civilistische Abhandlungen. No. 7.

state; consequently it concerns only the relations of the people to the government. The private law (*jus privatum*) comprehends those rules which pertain to the juridical relations of citizens among themselves.[a]

E. Legal Science.

§ 9. *Jurisprudence* is the science of compulsory laws, their reasons, and sources.[b] Therefore he who has merely a knowledge of the existing law, without any acquaintance with its philosophy and history, cannot be said to understand law as a science. Legal science has to discuss and answer the following questions:—1. What is the ideal or universal law? This is answered by the doctrines of philosophical or natural law (§ 3).—2. What is the actual or municipal law? This question is answered by positive jurisprudence, and may be subdivided into the three following queries: *a.* What are the present provisions of the law of the state? This is answered by the dogmas of the law themselves. *b.* How did these provisions originate? This is answered by legal history. *c.* Are those provisions reasonable? The answer to this question may be obtained through the philosophy of the (positive) law.[c]

2. Jus, in its Subjective Meaning.

A. Right and Duty.

§ 10. Jus (right), in its *subjective* meaning, is the legal authority to do or to demand something (§ 2). A right, in this sense, has always a corresponding duty or obligation (*officium*, not *obligatio*),[d] by which is generally understood the moral necessity of free actions or omissions. For in like manner as a right effects a moral possibility or freewill, a duty effects a moral necessity or obligation. Right and duty are correlative, that is, they are inseparable from each other.[e]

B. Perfect and Imperfect Duties.

§ 11. The corresponding *duty* must be performed in order to complete a right, and according to the dictates of reason every man ought to fulfil all his duties from internal impulse; but when he does not, the question arises: Whether and how far he can be compelled by external force

(*a*) § 4. J. 1. 1. — fr. 1. § 2. D. 1. 1.
(*b*) § 1. J. 1. 1. — fr. 1. pr. § 1. D. 1. 1.
(*c*) *Hugo*, Encyclopädie. 7th Ed. p. 34. — *Wening*, Encyclopädie. § 82 et seqq. — It has been already remarked (§ 3. not. *d.*), that the philosophy of positive law must not be mistaken for philosophical or natural law. See especially *Hugo*, Lehrbuch des Naturrechts. 4th Ed.; and *Marezoll*, Lehrbuch des Naturrechts. Giessen, 1819.
(*d*) The Romans never used *obligatio* in the sense of duty in general, but confined it merely to claims and debts.
(*e*) In the philosophical part of this Compendium, the author follows the doctrines of *Kant*.

to perform them. Here we meet with a remarkable difference in the duties of man. Some duties are such as to exclude any external compulsion; others admit of compulsion (§ 2). The former are called *imperfect* obligations, or duties of charity and conscience; the latter *perfect*, or compulsory obligations[a].

C. Perfect and Imperfect Rights.

§ 12. In the same manner as perfect and imperfect duties differ, the corresponding *rights* differ. That right to which an imperfect duty corresponds, is, for that reason, *imperfect* (moral right); that right, on the other hand, to which a perfect duty corresponds, is a *perfect* right, that is, a right in its proper meaning (juridical or legal right). The science of law has to do only with rights of the latter description; imperfect rights and duties belong to the department of morals.[b]

D. Maintenance of Juridical Rights by the State.

§ 13. The idea of a perfect right presupposes that he on whom it is conferred, must be enabled to maintain it by force. But this force cannot be exercised by himself: because the question whether a right has really been violated, cannot be left to the decision of him who pretends to have suffered a violation of his right; and because he who really has suffered a violation of a right, would not always possess the power required to enforce his right against the offender. The compulsion, therefore, can be exercised only by the supreme power of a state, which has been constituted for the purpose of maintaining the rights and liberties of individual members of the community against the violations and aggressions of others. This is legal or juridical compulsion: and as such compulsion can be effected only in a state, a juridical right, strictly so called, can exist only in a state; in other words, without a state (civil government), juridical relations among men cannot be realized.[c]

E. Subjects and Objects of Rights.

§ 14. In connexion with every right we find a subject and an object. The *subject* of a right is the person on whom a right is conferred; the *ob-*

(*a*) The Romans had no particular names to distinguish *perfect* duties from *imperfect*. Their word "officium" included both; and where they intended to denote a perfect duty, they used expressions like these: "cogendus est, tenetur, necesse est or habet, debet or debetur." The modern terms for it, are: "obligatio perfecta, necessitas legitima, officium jure impositum," &c.—*Hugo*, Encyclopädie. 7th Ed. p. 7 & 8.

(*b*) See *Hugo*, Encyclopädie. p. 9.—*Wening*, Encyclopädie. p. 54 et seqq.

(*c*) The *idea* of right and duty *in the abstract*, is not necessarily dependent upon the existence of a state; but a *juridical* or *compulsory* right supposes in fact, that he who has the right and he who withholds the right, should be subjected to a common superior (the power of the state). *Hugo*, l. c. —*Falck*, Encyclopädie. § 1.

ject of a right is the matter to which it relates. The objects of juridical rights (§ 12) extend only to external actions: because it is only in regard to these that a restriction of human freedom, or compulsion, can take place; whilst internal actions can neither be hindered nor enforced by others.

F. General Classification of Rights.

§ 15. The rights acknowledged and maintained by a state, with regard to the interests of its individual members, are: 1. Such as relate to the capacity for rights, that is, to those personal qualities without which one is not acknowledged to be a subject of rights. 2. Such as concern the family relations. 3. Such as relate to the estate of a person; and these are subdivided into: *a. real* rights, when they concern things subjected to one's power and free disposal; and, *b. personal* rights (obligations), when they relate to performances due from the persons obliged. Rights of capacity, family rights, and real rights are *absolute;* that is, they are rights which every one may be required to respect, and may therefore be enforced against any one who contests or invades them. Personal rights, or rights of obligation, are only *relative;* that is, they can be enforced only against the person obliged (§ 180).

G. General Classification of Duties.

§ 16. The duty which corresponds to a juridical right, is either a *general negative*, or a *special positive* duty. The former is enjoined on all men except him on whom the right is conferred, and consists in allowing him the unobstructed exercise and enjoyment of his right; the latter is enjoined on certain persons only, and consists in their performing what he who has the right, is, by virtue thereof, entitled to demand from them. The former, therefore, corresponds in particular to *absolute*, the latter to *relative* rights (§ 15).

H. Actions and Exceptions.

§ 17. He who has acquired rights, may, should they be contested, enforce them by process of law. To the expedients for prosecuting and enforcing rights, belong in particular the *actions* (*actiones*) and *exceptions* (*exceptiones*) (§ 193).

SECOND DIVISION.

HISTORY OF THE SOURCES OF THE ROMAN LAW.

I. Roman Law and its History.

§ 18. THE *Roman Law** in general comprehends all the laws which prevailed among the Romans, without regard to the time of their origin.[a] The *history* of this law† is now commonly divided into *external* and *internal*. The first treats only of the sources and literature of the law; the second treats of the legal doctrines themselves, with respect to their origin, their changes, and their gradual development.[b]

(*a*) In a more restricted sense, the Germans understand by it merely *Justinian's* law as adopted by them.

(*b*) For the methods of treating the history of the law, see: *Hugo*, Geschichte des römischen Rechts. 11th Ed. p. 33 et seqq.—*Th. M. Zachariä*, Ueber die Wissenschaft einer innern Geschichte des röm. Privatrechts. Breslau, 1802.—*Thibaut*, Ueber das Studium der röm. Rechtsgeschichte; in the Heidelberger Jahrbücher. Vol. 1. (1808). p. 1 et seqq. Juridisches Archiv von *Gönner, Gmelin*, und *Tafinger*. Vol. 6. p. 221.—*Rudhart*, Ueber das Studium der Rechtsgeschichte. Wurzburg, 1811.—*E. Platner*, Ueber die wissenschaftliche Behandlung der röm. Antiquitäten. Marburg, 1812.—*Savigny*, in the Zeitschrift für geschichtliche Rechtswissenschaft. Vol. 1. p. 1–17. — *Zimmern*, Geschichte des Römischen Privatrechts. Heidelberg, 1826. § 1. —*Schilling*, Bemerkungen über Römische Rechtsgeschichte. p. 3–14. — *Holtius*, historiæ juris Romani lineamenta; in procemio. Liege, 1830.

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* In Germany, the term "Roman law" is applied, by way of distinction, only to the Roman law in the form given to it by Justinian, and in which it was received into that country. It is proper, however, to add, that the purely German law was neither destroyed nor supplanted by the reception of the Roman law, but that both have continued to exist together.

† The illustration of every positive law is greatly assisted by reference to its history. Such reference is more especially necessary in the study of the Roman law, the gradual development of which is most intimately connected with history. The history of the Roman law has been little cultivated as regards either the system of legal proceedings or the public and criminal law; but much attention has been paid to that of the private law. The history of the latter has been divided into *external* and *internal*. The method at present pursued in Germany, is to separate the external history of the law from the internal; the external history is taught separately, and the internal history is connected with the exposition of the law itself. The *external history* illustrates the progress of legislation, and of the practice, science, and literature of the law. It should also direct the attention, as far as is requisite, to the antiquities, and especially to the political, moral, and intellectual condition of the people; for, the progress and development of the law stands in the closest connexion with the history of the people. While the external history has to do only with those external relations and events which have an influence on the origin and gradual formation of the law, and is not concerned with the legal doctrines or contents of the law itself, the *internal history*, on the contrary, relates solely to the legal doctrines; and its office is to show, where it is necessary, how the law originated, what changes it has undergone, what the actual law is, whence it has been developed, and what are the grounds upon which it rests.

No one can entertain a doubt as to the utility of investigations into legal history; indeed, a certain degree of acquaintance with the history of the Roman law is absolutely indispensable to a full understanding of that law itself. Still, the knowledge of the *law* is the practical aim which this study should be made to subserve; hence this object ought to be kept constantly in view, and the field of history should be cul-

II. Sources of the History of the Roman Law.[a]

§ 19. The sources of the history of the Roman law are:

1. The earlier and later Roman law collections themselves, together with the decrees of their publication.

2. All the original documents of the older laws and legal transactions which have reached us, even though in a fragmentary state:[b] as the fragments of the Twelve Tables (§ 23, 24); of some of the leges agrariæ, especially of the *Lex Thoria* (A. U.C. 643);[c] of some leges judiciariæ, especially of the *Lex Servilia repetundarum* (A. U. C. 654);[d] and likewise the fragments of the *Lex Julia et Papia Poppæa* (§ 37, note *f*); also the *Tabula Heracleensis* (between A. U. C. 664 and 680);[e] the *Lex Rubria*, heretofore commonly called the *Lex de Gallia Cisalpina* (after A. U. C. 711);[f] the *obligatio prædiorum;* the *Tabula Trajani Alimentaria*

(*a*) *Haubold*, Institutiones juris Romani literariæ. Leipsic, 1809. Vol. 1. P. 2. p. 217.—Idem, Anleitung zur genauen Quellen-Kunde des Rechts. Leipsic, 1818.—*Hugo*, Rechtsgeschichte. p. 4 et seqq.—*Zimmern*, Rechtsgeschichte. Vol. 1. § 2–8. — A very exact and complete Index of the most important sources of the Roman Law which have been discovered since 1813, especially through *codices rescripti*, has been published by *Schröter*, in the Hermes. Vol. 24. p. 318 et seqq. Vol 25. p. 271 et seqq.

(*b*) *Haubold*, l. c. p. 245 et seq.—*Zimmern*, Rechtsgeschichte. Vol. 1. § 3.—*Ern. Spangenberg*, Juris Romani tabulæ negotiorum solemnium superstites. Berlin, 1821.—*Haubold*, Antiquitatis Romanæ monumenta legalia. Ed. by *Spangenberg*. Berlin, 1830.—See also: *Clossius*, Hermeneutik des Röm. Rechts. p. 54–60.

(*c*) *Haubold*, l. c. p. 245.—They have been edited by *Ursinus*, and appended to Ant. Augustini liber de legibus et Sctis. Rome, 1584. No. 1–7.—*Rudorff*, in the Zeitschrift für geschichtliche Rechtswissenschaft. Vol. 10. No. 1.

(*d*) *Haubold*, l. c. p. 247.—*Ursinus*, l. c. No. VIII—XIV.—Fragmenta Legis Serviliæ repetundarum ex tabulis æneis primum conjunxit, restituit, illustravit *Klenze*. Berlin, 1825.

(*e*) *Haubold*, l. c. p. 249.—*Hugo*, Civilistisches Magazin. Vol. 3. p. 340. Fragmentum legis Romanæ in aversa tabulæ Heracleensis parte. Notis criticis et commentario illustravit *G. Th. L. Marezoll*. Gottingen, 1816.—*Dirksen*, Observationes ad tabulæ Heracleensis partem alteram, quæ vulgo æris Neapolitani nomine venit. Berlin, 1817. Idem, Bemerkungen über die erste Hälfte der Tafel von Heraclea; in his Civilistische Abhandlungen. Vol. 2. No. 2.—Especially *Savigny*, in his Zeitschrift. Vol. 9. p. 340 et seqq.

(*f*) See below §§ 47, 48, and 57.—*Haubold*, l. c. p. 248.— *Hugo*, Civilistisches Magazin. Vol. 2. p. 431.—*Dirksen*, Diss. proponens observationes ad selecta Legis Galliæ Cisalpinæ capita. Berlin, 1812. (Reviewed by *Hugo* in the Göttinger Gel. Anz. 1812. p. 1689).—Tavola legislativa della Gallia cisalpina ritrovata in Velleja nell' anno MDCCLX e restituta alla sua vera lezione da *D. Pietro de Lama*, colle observazioni e annotazioni de due celebri Giurisconsulti Parmigiani. Parma, 1820. (See respecting this, *Jourdan*, in the Thémis. Vol. 6. p. 525.)—As for the name of the so-called *Lex Galliæ Cisalpinæ*, see: *G.F. Puchta*, Civilistische Abhandlungen. Leipsic and Berlin, 1823; and in *Hugo's* Civilistisches Magazin. Vol. 6. p. 123. (Reviewed by *Huschke*, in the Tübinger kritische Zeitschrift. Vol. 5. p. 352.)—*Huschke* de actio-

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tivated no further than as it yields an adequate return. The mere fondness of some civilians for mouldering antiquities, and for historical details of obsolete legal doctrines, must by no means be imitated by the legal student, whose attention from the first should be directed to practical ends. That the too theoretical method of legal instruction so prevalent in Germany, cannot be compared for solidity and utility with the almost purely practical mode pursued in England and the United States, is made sufficiently evident by the every-day results of the two systems. The foregoing observation, of course, applies especially to the study of the *internal* history: and truly the teacher of the law has here a most excellent opportunity afforded him, of awakening in the minds of his pupils a love for historical studies and investigations; and this he should effect by an exhibition of the practically important results obtained from history.

(A. U. C. 856);[a] *T. Flavii instrumentum donationis*;[b] the *Senatusconsultum de imperio Vespasiani;* the *SC. de Bacchanalibus*;[c] the fragments of the Prætorian Edict (p. 30, note *a*); and an edict of Diocletian regulating wages and the prices of provisions.[d]

3. Also many of the Grecian and Roman authors, the non-legal as well as the legal. Among the writings of the jurists which have been preserved, the following deserve to be particularly noticed: Ulpian's Fragments, Gaius's Institutes (§ 47), and the Greek Paraphrase of Justinian's Institutes by Theophilus (§ 67).[e] Among the non-legal writers the following contain the fullest stores of information on this subject: Polybius, Dionysius of Halicarnassus,[f] Plutarch, Cicero,[g] Valerius Maximus, Tacitus, the elder and younger Pliny,[h] Suetonius, the *Scriptores historiæ Augustæ*[i] *et Byzantinæ*, Johannes of Lydia;[j] also the Grammarians, especially Varro, Seneca, Quintilian, Asconius Pedianus, Aulus Gellius, and at a later period Sextus Pompeius Festus, Servius, and Boethius; the *Scriptores rei agrariæ, rusticæ*, and Vitruvius on Buildings; and in some respects the Latin and Greek Ecclesiastical writers.

III. Periods of the History of the Roman Law.[k]

§ 20. The divisions best adapted to the history of the sources of the

num formulis, quæ in lege Rubria extant. Breslau, 1832. (See *Hugo's* review, in the Göttinger Gel. Anz. 1832. No. 21.)—*Savigny*. in his Zeitschrift. Vol. 9. p. 309 et seqq. —*Burchardi* de lege Rubria. Kiel, 1839.—*Puchta*, in Savigny's Zeitschrift, Vol. 10. No. 2., who defends the opinion that the law was called *lex Rubria*, in which Savigny now agrees with him. (*Savigny*, Zeitschrift. Vol. 11. No. 1. p. 58.)

(*a*) *Haubold*, l. c. p. 291.—*Hugo*, Civilistisches Magazin. Vol. 2. p. 432.—*F. A. Wolf*, Von einer milden Stiftung Trajans. Berlin, 1808. Compare with it: *Savigny*, in the Heidelberger Jahrbücher. Vol. 2. p. 254.—Quæstio antiquaria de pueris et puellis alimentariis. Specimina tria. Edited by *Pauffler*. Dresden, 1809.—Tavola alimentaria Velejate, detta Trajana, restituta alla sua vera lezione da *D. Pietro de Lama*, con alcune osservazioni del medesimo. Parma, 1819.—Göttinger Gel. Anz. 1821. No. 138.—*Glück*, Commentar über die Pandecten. Vol. 28. p. 267.—*Schultz*, Staatswissenschaft der Römer. § 71.

(*b*) Discovered, 1837, by *Ritschel*. Commentaries upon it were published by *Huschke*, Breslau, 1838. See also: *Testamente* Annali dell' instituto di corrispondenza archeologica. Vol. 1831. No. 2.

(*c*) *Haubold*, p. 251. 253. *Livy*, XXXIX. c. 8.

(*d*) Transactions of the Royal Society of Literature. London, 1827. Vol. 1. Part 1. —*Schultz*, Grundlegung zu einer geschichtlichen Staatswissenschaft der Römer. p. 631 et seqq.—See also: *Spangenberg*, Monumenta legalia. Appendix, p. 1–23.

(*e*) See *Dirksen*, Bruchstücke aus den Schriften der römisch. Juristen. Konigsberg, 1814.

(*f*) *P. F. Schulin*, Diss. de Dionysio Halic. historico, præcipuo historiæ juris Romani fonte. Heidelberg, 1820.

(*g*) *Ed. Platnerus*, Diss. de iis partibus librorum Ciceronis rhetoricorum, quæ ad jus spectant. Marburg, 1829; 2d. Ed. ibid. 1831. —See also below, § 45.

(*h*) *Van der Brugghen*, locorum juris civilis ex Plinii junioris scriptis explicatio. Leyden, 1827.—*J. A. Sneither*, Diss. qua loca e Plinii junioris scriptis, quæ ad jus civile pertinent, recensentur et illustrantur. Groningen, 1827.

(*i*) *Dirksen*, Die Scriptores historiæ Augustæ. Leipsic, 1842.

(*j*) *Joannis Laurentii Lydi* de magistratibus reipublicæ Romanæ libri III. Edited by *J. D. Fuss*. With a preface by *C. B. Hase*. Leyden. 1812. Compare on this: *Cramer*, in supplem. ad B. Brissonium de verborum significatione. p. 18–30.—*Reuvens*, Collectaneæ liter. Leyden, 1815. p. 20–87.—*J. D. Fussii* ad *Car. B. Hasium* Epistola, in qua Lydi textus et versio emendantur, loci difficiliores illustrantur. Liege, 1820. New Edition by *Imm. Bekker*. Bonn, 1837, in the Corpus scriptor. hist. Byzant.—*Dirksen*, Vermischte Schriften. 3d Treatise.

(*k*) On the periods of legal history in

Roman law, are those which were first chosen by Gibbon,[a] and afterwards adopted by Hugo. They are: *First* Period, from the foundation of Rome to the adoption of the Twelve Tables. *Second* Period, thence to Cicero. *Third* Period, from Cicero to Alexander Severus. *Fourth* Period, from Alexander Severus to Justinian.[b]

FIRST PERIOD.

FROM THE ORIGIN OF THE ROMAN STATE TO THE TWELVE TABLES.*

(A. U. C. 1-300, or B. C. 750-450.)

§ 21. The State of Rome was originally formed by the union of several distinct tribes, each of which retained its individual laws; whence it arose

general, see: *G. F. Puchta*, Civilistische Abhandlungen. No. 5.—*Schilling*, Bemerkungen über Hugo's röm. R. G. p. 14–20.

(*a*) *Gibbon*, History of the Decline and Fall of the Roman Empire. Chap. 44., which contains a historical survey of the Roman Law, and has been separately translated into German by *Hugo*. Gottingen, 1789. The French translation by *Guizot* has been revised by *Warnkönig*, and appeared with the annotations of both, under the title: Précis de l'histoire du droit Romain par Gibbon. Liege, 1821.

(*b*) *Hugo*, Rechtsgeschichte. p. 60–65. (All subsequent citations of this work refer to its 11th Edition.)

* It will be evident that a unity of law could not well be supposed to exist in the Roman state at its commencement, when we consider of what diverse elements it was originally composed. The slight improvements which the private law received, were effected during the monarchy, by the enactments of the kings, and after their expulsion, by those of the *curiæ* (assemblies of the patricians), the *tribus* (assemblies of the plebeians), and the *centuriæ* (assemblies of both together). The overthrow of the monarchical constitution did little towards ameliorating the condition of the plebeians; since they remained exposed to the oppressions and exactions of the patricians, until A. U. C. 260, when they secured to themselves the privilege of appointing deputies (*tribuni plebis*) to watch over and defend their rights. Though this occasioned many subsequent dissensions among the people, it was the first institution that gave to the government a democratic tendency. The laws, however, were not committed to writing in a comprehensive shape until the formation of the Twelve Tables; these were chiefly designed for the political equalization of the two classes, and formed the first foundation for a mutual and intimate approximation of their rights and interests. Yet this law did not abolish either the legal prohibition against intermarriages (*connubium*) between the patricians and plebeians, or the cruel law against debtors; although it was the inhuman severity of the latter, as exercised towards the plebeians, that had been the main cause of their political conflicts. The Romans, at this time, had made but little progress in civilization. War and agriculture were their principal pursuits. Their predilection for war explains to us why the rights of women were so little respected; while in the fondness for agriculture which existed even among the higher classes, we find the reason why no feudal institutions were found among them. Their religion, which was regarded rather as a political engine than as a means for the spiritual and moral improvement of the people, stood in the closest connexion with the administration of justice; and it is on this account the more to be regretted, that we have so little accurate information respecting it. The administration of justice, as well as the performance of the priestly functions, rested in the hands of the patricians. The art of writing, among them, was very imperfect; tablets of metal, or of wood covered with wax, formed their writing material. Their money consisted of unwrought pieces of copper weighed for the occasion; whence the expression *per æs et libram*, uttered by the purchaser in fictitious sales, while he struck the scale with a piece of money (*æs*). The principal public officers under the kings, in addition to the senate, were a *præfectus urbi*, and two *quæstores* for the management of the public revenue. Under the consuls, the *tribuni plebis* were introduced, and also the *ædiles*, who were insignificant officers of police. It should likewise be remarked, that the Roman territory at first consisted of the city alone.

that originally different laws were in force at the same time. These older individual laws, which, like the primitive laws of all nations, rested partly upon the common belief of the people, and partly upon their customs and usages, became gradually merged into a *Roman* national law common to them all (§ 23). The members of this new state were from the earliest time divided into two separate classes, viz: into the *patricians*, who formed a nobility by inheritance; and the *plebeians*, who constituted the class of free citizens, composed partly of the clients of patrons chosen from the patricians, and partly of citizens not depending upon patrons, including the free landholders. At first the plebeians were only *protected* members of the new state and without higher political rights, and were therefore excluded from any participation in the government of the state or use of the public lands (*ager publicus*), both being in the hands of the patricians.[a] The patricians and plebeians seem also to have differed from each other not only by class, but by their descent; and thus, though they lived united in the same state, they were ruled by different laws, and distinguished by different manners. In its form of government, the state of Rome was a limited monarchy. A head with the title *rex*, elected for life, was the leader of the state; joined to whom was a *senate*, consisting originally of patricians only. The legislative power remained with the people, and was exercised by them in their national assemblies (*comitia*). The king and senate were each entitled to propose laws (*legem ferre*):[b] which were then discussed and voted upon in the meetings of the people; at first by curiæ, which were formed solely of the patricians;[c] in later times by centuriæ, of which the plebeians also were

(*a*) *Niebuhr*, Röm. Geschichte. Vol. 1. 2d Ed. p. 317–350. More especially p. 417 et seqq. — *Hüllmann*, Röm. Grundverfassung. § 3. 4.—About Patricians and Plebeians see: *Heiberg* de famil. patricior. nexu. Hervici, 1829. *Strässer*, Ueber die Röm. Plebejer der ältesten Zeit. Elberfeld, 1832. *J. Rubino*, Röm. Verfassung und Geschichte. Vol. 1. Cassel, 1839. There is much dispute as to whether Mackeldey's opinion respecting the class of Clients is correct: it is now supported by *Burchardi* (in his Lehrbuch des Röm. Rechts. p. 47.); on the other hand *Niebuhr's* opinion that the plebeians formed a separate class subject to the patricians is defended by *Puchta* (in his Institutionen-Cursus. p. 147). —In the earliest time the public power was lodged in the *populus*, which was divided into 30 *curiæ*, each consisting of 10 *gentes* (decades), Dionys. II. 7. From the *seniores* of the gentes the senate was chosen. A *rex* had the *imperium*. The plebeians and clients did not belong to the *populus* in this meaning. Servius Tullius united all who bore the burdens of war and peace, into a new order; in which, however, he retained the comitia curiata. Five classes were made, and each subdivided into *centuriæ*. The first class contained 80; the second, third, and fourth, 20 centuriæ each; and the fifth, 30. Property formed the basis of this classification. In each class, half the number of the centuriæ were to be formed by those who had passed their 45th year. 18 *centuriæ equitum* were considered to belong to the 1st class. Thus, property, age, and rank were recognised in this classification; see *Livy* I. 43., *Dionys.* IV. 16., *Gellius*, X. 28., *Servius* ad Virgil. Æn. VII. 716. Neither the manuscript, nor as it would seem the computation, of Cicero de republ. II. 22. can be trusted. The latest illustration of this classification is to be found in *Göttling*, Geschichte der Röm. Staatsverfasung. p. 244 et seqq. See also the literary works mentioned in *Dünz*, Lehrbuch der Geschichte des Röm. Rechts. § 18.

(*b*) *Legem ferre* among the Romans did not mean to give a law, but to propose one to the people, and was synonymous with *rogare legem* or *rogationem ferre*. Of him whose proposal was adopted, they said: *pertulit legem*. See *Heineccii* Antiq. Rom. Lib. 1. tit. 2.

(*c*) *Hüllmann*, l. c. § 5, does not agree with this opinion.

members, whereby they first obtained some political importance and share in the legislation.[a] The laws proposed, if adopted in these meetings of the people, thereby obtained their legal force (*lex curiata, centuriata*).[b] The ancient leges curiatæ[c] are said to have been collected in the time of Tarquin, the last of the kings, by a pontifex maximus of the name of Sextus or Publius Papirius.[d] The existing fragments of this collection are but few, and those of a very doubtful character.[e]

Commencement of the Republic.

§ 22. After the kings were expelled (A. U. C. 244), Rome became a republic, and two *consuls* were substituted for the king. They were elected annually, and at first were chosen exclusively from the patricians. In consequence of this alteration in the constitution, the supreme power came wholly into the hands of the senate and the patricians. The plebeians were almost entirely excluded from any share in the government and administration of the state; as the patricians by their rank and wealth overbalanced them also in the comitia centuriata, to which the election of magistrates and the adoption of laws (by suffrage) had then been transferred. From this injustice, as well as the oppression which the patricians practised against the plebeians, the greater part of whom in consequence of the war had fallen into poverty, severe contests arose between these classes; and this gave rise to the establishment of the *tribuni plebis* (A. U. C. 260), who were to be chosen from the plebeians to protect their rights against the assump-

(*a*) The division into Classes and Centuries, first introduced by *Servius Tullius*, seems to have been made only for the purpose of recruiting the army and facilitating taxation, and not to have been applied to the purpose of legislation and election, until after the expulsion of the kings: since the patricians then needed the aid of the plebeians in both those respects. See especially: *Cicero* de republ. 2. 31. *Livy*, lib. 1. cap. 60. *Schrader*, in the Tübinger krit. Zeitschrift. Vol. 1. No. 2. p. 135.—*Niebuhr*, Vol. 1. 2d Ed. p. 446 et seqq. —*Hüllmann*, l. c. § 10. 11. 23.—*Francken* de tribuum, curiarum, atque centuriarum ratione. Sleswick, 1824.—*Van Heusde*, Diatribe in civitates antiquas; in Comment. tertiæ Classis Instituti Belgici. Amsterdam, 1817. p. 30.—*Rud. de Raumer* de Servii Tullii censu. Erlangen, 1840.

(*b*) In some cases, however, decrees of the *comitia* needed the ratification of the senate.

(*c*) Or perhaps called *Leges regiæ*, when the proposal was made by the king. *Cicero* de republ. II. 13–21. V. 2.—*Livy* (lib. 40. cap. 29.) speaks of a collection of the laws of *Numa*, which, it is said, had been discovered in later times, but was suppressed by the senate from political motives.

(*d*) This collection was afterwards called *jus civile Papirianum*: "non quia Papirius de suo quicquam adjecit, sed quod leges sine ordine latas in unum composuit." fr. 2. § 2. D. 1. 2. Sometimes it occurs under the name *Lex Papiria*. *Servius* ad Virgil. Æn. XII. 836. It is probable, however, that Papirius only collected the laws relating to public worship, or that his work was only a formulary for the priests. The lawyer *Granius Flaccus* wrote a commentary on it as late as the time of Julius Cæsar (de indigitamentis). *Glück*, De juri civili Papiriano liber sing. In Opusc. fasc. 2.—*Dirksen*, Versuche zur Kritik und Auslegung der Quellen des römischen Rechts. Leipsic, 1823. p. 234.—*Daunou* sur le droit Papirien, in the Thémis Vol. 5. p. 251. —*Z. Salberda*, Disp. de jure civili Papiriano. Groningen, 1825. — *Zimmern*, Rechtsgeschichte. Vol. 1. § 27.—*Elvers* de clarissimis monumentis. Rostock, 1835. p. 7 seqq. See *Huschke's* Review in *Richter's* Zeitschrift. 1837. No. 43.

(*e*) They are contained in *Haffmann*, historia juris. Vol. 2. Part. 1. p. 1. See also: *Terrasson*, Hist. de la jurisprudence Romaine. p. 22.—Comp. also *Hugo*, Rechtsgeschichte. p. 375–379.

tions of the patricians, and whose persons were to be held sacred and inviolable (*sacrosancti*)[a]. They had at first only the right to protest (*intercedere*) against the decrees of the consuls and the senate, and to render them ineffective by their *veto*;[b] but they soon after acquired also the right, as chiefs of the plebeians, to propose laws to them in the comitia tributa, which were only subjected to the discussion and suffrage of the plebeians: these laws, when approved, were called *plebiscita*. Besides the tribunes, two other magistrates of their own were at the same time granted to the plebeians, viz. the *ædiles*, who were to take charge of the police and other matters relative to the public welfare.[c] From all other higher offices the plebeians continued to be excluded; and it was not until the Second Period, that they were admitted to the dignities of consul, ædilis curulis, dictator, censor, prætor, and at last even to that of pontifex.

The Twelve Tables.

§ 23. The contests between the patricians and plebeians which still continued, produced at the close of this period (A. U. C. 300) the celebrated law of the Twelve Tables.[d] This law bears the character not of a new civil code, but rather of a constitution; it being, as it were, an act of capitulation of each class to the other. Its main objects were to establish by law the equality of the patricians and plebeians; to define the limits of the judicial power, then in the hands of the consuls; and to regulate the judicial proceedings. On this occasion also

(*a*) *Livy*, lib. 2. cap. 32. 33. lib. 3. cap. 55. —*Niebuhr*, Röm. Geschichte. Vol. 1. 2d Ed. p. 624. *Aug. Fr. Soldan*, Comm. de origine, causis et primo tribunorum plebis numero. Hanau, 1825.—*Hüllmann*, § 15. 17.—*Puchta*, Institutionen. Vol. 1. p. 180.

(*b*) From this, *Cicero* contra Rullum 2. 6, calls the tribune: "præsidem libertatis, custodemque."

(*c*) Also of certain edifices and archives. *Dionys. Halic.* lib. 17. cap. 90.—*Gellius*, lib. 17. cap. 20. —*Varro* de ling. lat. lib. 4. cap. 14. —*Pomponius* in fr. 2. § 20. 21. D. 1. 2. The office of ædiles curules originated at a later period (§ 33). See in general *Niebuhr*, 2d Edition. Vol. 1. p. 650. 2d vol. 263. *Thibaut*, Civilistische Abhandlungen. No. 8.—*Schubert*, de Romanorum Ædilibus. Konigsberg, 1828. (Reviewed by Zachariæ in the Götting. Gel. Anz. No. 80.)—*Hüllmann*, § 16. 28.

(*d*) The first proposal for it was made by the tribune Caius Terentius Arsa through the Lex Terentilla (A. U. C. 293). The history of its origin is to be found in *Livy*, lib. 3. c. 32 seqq.—See *Cicero* de republica II. 36. 37.—*E. Ottonis* Dissertatio de legibus XII Tabularum, as a preface to his Thesaurus juris Romani, Vol. 3d; and in his Commentaries on the Institutes. Frankfort and Leipsic, 1743. p. 617.—*Gibbon's* History of the Decline and Fall of the Roman Empire. Chap. 44.—*Bonamy*, Dissertation sur l'origine des lois des XII Tables, in his Mémoires de l'Académie des Inscriptions, Vol. 12.—*Gratama*, Oratio de Hermodoro Ephesio, vero XII Tabb. auctore; in the Annals of the Academy of Groningen, 1816, 17.— *S. Ciampi*, Novum examen loci Liviani de legatis Athenas missis. Wilna, 1821.—*W. A. Macieiowski*, Legum Solonis et Decemviralium Comparatio, et excursus ad Livii historiarum lib. 3. c. 34. —Idem, Opusculorum sylloge I. Warsaw, 1823.— *C. E. Lelièvre*, Commentarii de legum XII Tabularum patria. Louvain, 1827. —*A. C. Cosman*, Dissertatio de origine et fontibus XII Tabb. Amsterdam, 1829—*Niebuhr*, Vol. 2, 2d Edition p. 349–405.—*Hugo*, Rechtsgeschichte p. 97–108. — *Zimmern*, Rechtsgeschichte Vol. 1, p. 92.—*Hüllmann*, § 16.—*Walter*, p. 90 seqq.—*Göttling*, p. 313 seqq.—*Puchta*, Institutionen. Vol. 1. p. 187 seqq.—*Burchardi*, Lehrbuch des Römischen Rechts. Vol. 1. § 21. 22.—*Holtius*, Historiæ juris Romani lineamenta. § 15. 16.—*Fischer*, Erläuterung des XII Tafelgesetzes. Tubingen, 1838.

a large part of the private law as it had existed for a long time previous, was committed to writing; and at the same time the old laws peculiar to the different tribes, were merged into one national law.[a] This law of the Twelve Tables, which was adopted in the comitia centuriata, acquired great authority, and constituted the foundation of all the public and private law of the Romans subsequently, until the time of Justinian.[b] By way of distinction it is sometimes called *Lex;* or, after the commissioners chosen to compose it (decemviri legibus scribendis), *Lex decemviralis.*

Their Remains.

§ 24. The Twelve Tables were originally engraved upon wood or ivory, and publicly exposed before the rostra, that they might be read and observed by every one.[c] But on their restoration, after the devastation of Rome by the Gauls,[d] they were engraved on brass;[e] and they were found thus exposed in the third century of the Christian era.[f] Yet although they were preserved so long, only fragments of them remain at the present day, for the restoration of which Jacob Gothofred deserves much credit. He has collected them chiefly, from the fragments of *Gaius's* Commentaries on the Law of the Twelve Tables contained in the Pandects, from *Ulpian's* Fragments, and from *Festus* de Verborum Significatione.[g] The lately discovered Institutes of *Gaius* (§ 47, note *b*) and the Vatican Fragments (§ 57) have supplied some more genuine passages previously unknown. Many of the passages contained in Cicero's works are not genuine fragments, but mere circumscriptions and imitations of the Twelve Tables. For

(*a*) *Livy*, III. 34. 56.—*Niebuhr*, Vol. 2. 1st Edition p. 109.—See contra: *Hugo*, l. c. p. 100. note 2.

(*b*) *Cicero* de legibus, lib. 2. c. 23; de oratore, lib. 1. c. 43. 44. In this last passage Cicero introduces Crassus, saying: "Bibliothecas mehercule omnium philosophorum unus mihi videtur XII tabularum libellus superare." On the other hand he says in his Republica, lib. 2. c. 36. 37. "The last two tables contain nothing but jus iniquum."—*Livy*, lib. 3. c. 34. calls them: Fons omnis publici privatique juris.—*Tacitus*, in his Annals, lib. 3. c. 27: "Finis æqui juris," that is, the highest degree of equality of law to all Roman citizens; this passage, however, is understood very differently. See *Niebuhr*, l. c. —*Welcker*, Letzte Gründe von Recht, Staat und Strafe. p. 452.—*Hugo*, Rechts-Geschichte, p. 102.—*Schröter*, Observationes juris civilis. Jena, 1825 Obs. 1. Reviewed by *Puchta* in Schunck's Jahrbücher Vol. 4. p. 42.—*Schultz*, Staatswissenschaft der Römer, p. 306. 327 seqq.

(*c*) It is uncertain, whether they were engraved at the beginning upon wood, ivory, or brass. fr. 2. § 4. D. 1. 2. Instead of "eboreas," Scaliger adopts the word "roboreas." Livy III, 57. on the other hand says: "In æs incisas in publico proposuerunt." See *Gibbon* c. 44.—*Zimmern*, Rechts-Geschichte, Vol. 1. § 31.—*Dion. Halic.* X. 60.—*Schneider*, in Richter's Zeitschrift. Vol. 2. p. 554.

(*d*) A. U. C. 364, when the Tables were destroyed.

(*e*) *Livy*, VI. 1.

(*f*) *Cypriani* Epistolæ II. 5. See also: *Kämmerer*, Observationes juris civilis. Rostock, 1827. cap. 5.

(*g*) They are to be found in *J. Gothofredi* Quatuor fontes juris civilis. Geneva, 1653. (Copied thence in *Otto's* Thesaurus. Vol. 3. p. 1.)—*Gravina* de origine juris civilis. p. 280. —*Terrasson*, Histoire de la jurisprudence romaine. p. 54.—*Bouchaud*, Commentaire sur la loi des douze tables. Paris, 1787. New Edition, Paris, 1803. 2 Vols. (Reviewed by Hugo in the Göttinger gel. Anz. 1804 No. 47.) —*Bach*, Historia juris Romani lib. 1. cap. 2. 6th Edition p. 36. See also *Van der Heim* de Jacobi Gothofredi meritis in restituendis XII Tabularum Fragmentis. Leyden, 1823.

the later attempts to restore them we are much indebted to Haubold and Dirksen, whose editions of the text differ greatly from that of Gothofred.[a]

SECOND PERIOD.

FROM THE TWELVE TABLES TO THE TIME OF CICERO.*

(A. U. C. 300–650, or B. C. 450–100.)

1. Political condition of the Republic in its highest state of development.

§ 25. In this period[a] the distinction between *populus* and *plebs* had entirely lost its original meaning and importance. Both the comitia voted in tribus. The comitia centuriata were con-

(a) *Haubold*, Institt. jur. Romani epitome. p. 129. (also in his Inst. jur. lineamenta; edited by Otto, Leipsic, 1826.)—*Dirksen*, Critik und Herstellung des Textes der Zwölf-Tafel-Fragmente. Leipsic, 1824.—*Zell*, Legum XII Tabb. Fragm. Freiburg, 1825.

* The way to a national union of the two classes was in a great measure prepared by the adoption of the law of the Twelve Tables, and especially by the *lex Canuleia*, which allowed intermarriages between them. The primary source of the law of the Romans was their ancient customs; and this is the reason why the term "jus civile," which denotes the Roman positive law in general, was also used in a stricter sense to signify the law of custom, as the basis upon which the whole fabric of law was constructed. The decisions of the senate and people were comparatively barren as regards the private law. The *plebiscita*, however, became of more consequence after the *lex Hortensia* (A. U. C. 465) had extended them so as to bind the patricians also. The jurists at first employed themselves in maintaining the strictness of the law, and in preserving its ancient forms, while the prætors continued to introduce into it such improvements as were required by the times. The prætorship was founded A. U. C. 387; but prætores peregrini were not appointed until the year 508. In the provinces, the rights of the non-Romans (*peregrini*), that is, of all who were not citizens, were placed under the protection of the præfecture, as in Rome they were under that of the prætor peregrinus.

Thus an entrance was opened for the gradual introduction of many of the law principles of other nations, into the *jus civile;* for after those principles had been applied to foreigners in their contests among themselves, or with Roman citizens, it was natural that these more enlarged legal views of other nations should be gradually adopted, instead of such strict Roman principles as were no longer suited to the times. Those rules and regulations which the Romans found to be equally observed among all other nations, and which they themselves had become acquainted with by use and practice, were called by them, *jus gentium;* and hence Gaius describes it as consisting of the *leges moresque peregrinorum*. In proportion as the Roman dominion spread over several parts of the world, and as the relations with foreign nations increased in extent, it became necessary that the jus gentium should be more and more referred to and adopted into general use. It is to this reception of the jus gentium into the jus civile, that the Roman law chiefly owes that universal character, which so well adapts it to form the basis of the legislation of civilized nations in later times.

Legislation was divided among the people, the senate, and the magistracy. Among the latter, the tribunes assumed a prominent place. The senate had the control of the finances, the management of the foreign department, the organization of provinces, and the appointment and superintendence of governors, as well as the power of legislating on private affairs. The populus Romanus, which consisted of all the freemen who possessed the right of citizenship, exercised the criminal jurisdiction, and had the election of magistrates, besides the power of legislation, in their assemblies. The public offices created in this period, were those of the *prætores urbani* and *peregrini*, the *censores*, and the *ædiles curules*. Of these the *prætores* were the most important,

convened by a senatorial magistrate; the comitia tributa by the tribunes: the former voted by centuriæ, the latter *viritim* in the tribus.[a] The several departments of government were ably and faithfully administered, and assisted and harmonized with each other. The senate endeavoured every where to mediate, and rather yielded to circumstances than followed any fixed principles.[b] The tribunes had no *imperium*, but remained, as they had been, the controlling and leading representatives of the people. The classes of the people were changed into the following: senators, equites, freeborn citizens, and freed citizens.[c]

2. Law Sources of this Period.

§ 26. The law sources subsequent to the Twelve Tables, from which the law of the Tables, as well as the unwritten law of the times, was supplied and developed, may be reduced to two kinds, viz. *explicit* law (*jus scriptum*, written law) and law *established by custom* (*jus non scriptum*, unwritten law). The general observation may here be made, that the improvement of the law, which constantly advanced from this time, was effected not so much by the enactments of the legislative power as by the judges and lawyers, through the gradual development of the existing principles of the law, derived from manners and customs.[d]

I. Legislation.

§ 27. The class of *explicit* or *written* law comprised the *leges*, *plebiscita*, and *senatusconsulta*.

1. *Leges and Plebiscita.* (e)

The *leges* (the decrees of the people in a strict sense) were laws which were proposed by a magistrate presiding in the senate, and adopted by the Roman people (*populus Romanus*) in the comitia centuriata.[f] These related almost entirely to the public law. The *plebiscita* were laws proposed by one of the tribunes, and passed by the

(a) *Dion. Halic.* IV. 24. *Livy*, I. 43. i. f. XLIII. 16. *Sallust* de bello Jugurth. c. 86. See also *Huschke*, Verfassung des Serv. Tullius, c. 12. and *Göttling*, p. 380, likewise *Puchta*, Inst. p. 221 seqq.

(b) *Puchta*, l. c. p. 260 seqq. 288 seqq.

(c) See *Schlosser*, Universalhistorische Uebersicht der Geschichte der alten Welt. Vol. 2. p. 455 seqq. As early as this time, the contests had commenced between the two parties (the Optimates and the Populares) from which the civil war arose.

(d) *Savigny*, Gesch. des R. R. in M. A. Vol. 1. p. 2.

(e) *Heinec.* Antiq. Rom. lib. 1. T. 1. § 1–14.

(f) *Gaius*, lib. 1. Tit. 3. § 4. J. 1. 2.

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on account of the extent of their jurisdiction. The *edicts* of the prætors, which afterwards acquired legal authority, not as proceeding from a legislative power, but from the silent assent of the people, are properly to be regarded as a part of the *law of custom*. These edicts consisted chiefly of rules of proceeding. The *edicta repentina* were those made by the prætor during his term of office, on the occurrence of such new cases as had not been provided for. *Edictum perpetuum* was the name given to an edict issued by the prætor on his first entering upon office: and this was either *novum*, when a prætor set up a principle of law for the first time; or *tralatitium*, when its substance was already contained in the previous edicts.

plebeians alone in the comitia tributa, independently of the patricians (*sine auctoritate patrum*).[a] They were for this reason binding upon the plebeians only, until the consuls Horatius and Valerius (A. U. C. 305) succeeded in passing a law, *ut quod tributim plebs jussisset, populum teneret* (that the decrees passed in the meetings of the plebeians, should be laws for the whole people); which was afterwards renewed and confirmed (A. U. C. 416) on the motion of the consul Publilius, *ut plebiscita omnes Quirites tenerent* (that all the Romans should be bound by the decrees of the plebeians), and again (A. U. C. 465) on the motion of the dictator *Hortensius*.[b] The *plebiscita* of this period related more than the *leges* to the private law.[c]

2. *Senatusconsulta.*

§ 28. The *senatusconsulta* were decrees of the senate, without the concurrence of the plebeians.[d] Like the *leges*, they generally had reference to public law; there are in this period, however, several instances of decrees of the senate concerning matters of private law.[e] At first the plebeians objected to the legal force of the decrees of the senate; but after the senate submitted to the *plebiscita*, they acknowledged the *senatusconsulta* as binding upon themselves;[f] though the right of interceding (protesting against the decrees) remained with their tribunes.[g]

II. Law of Custom.

A. In general.

§ 29. The *law of custom*, which was formed in various ways, was of much greater importance to the private law, than the sources before mentioned. The particular kinds of this law were: the *mores majorum*, or law which had its foundation in the manners and customs of their ancestors, and was transferred from these to their descendants;[h] the *consuetudo*, or the law which originated from

(*a*) § 4. J. 1. 2.—*Gaius*, lib. 1. 3.—*Heinec.* Antiq. Rom. l. c. § 15–17.—*Hüllmann*, Röm. Grundverf. § 22, 24.

(*b*) *Livy*, III. 55. VIII. 12.—§ 4. J. 1. 2.—fr. 2. § 8. D. 1. 2.—*Gaius*, 1. 3.—*Gellius*, XV, 27.—*Theoph.* Paraphr. ad § 5. J. 1. 2.—*Niebuhr*, Röm. Gesch. Vol. 2. 2d Ed. p. 414.—Contra: *Schultz*, Staatswissenschaft der Römer p. 336; but see *Walter*, Geschichte des Röm. Rechts, p. 107. *Puchta*, l. c. 208.

(*c*) The leges as well as the plebiscita received their names from those who had proposed them; for instance the lex Aquilia, lex Plætoria, &c.

(*d*) *Gaius*, 1. 4.—§ 5. J. 1. 2.—fr. 2. § 9. D. 1. 2.—*Augustinus*, Opera Tom. 1. p. 1. seqq.—*Heinec.* Antiq. Rom. lib. I. 1. § 46–54.—*Haubold* l. c. 156.—*Buning*, Diss. de Sctis Romanis. Groningen, 1823. *Puchta*, Inst. p. 289.

(*e*) *Hugo*, R. G. p. 406–14; and *Schilling*, Bemerk. p. 116. E. g. the senatusconsultum on the quasi-usufruct. See below, § 282.

(*f*) *Theoph.* Paraphr. ad § 5. J. 1. 2; but see *Walter*, Gesch. des Röm. Rechts. p. 131, who rejects the view of Mackeldey, given in the text.

(*g*) A decree, when the tribunes protested against it, was no senatus consultum, but only senatus auctoritas. *Cicero* ad Div. VIII. 8. *Livy*, IV. 50, 56, 57.—*Gellius*, XIV. 7.—*Hüllmann*, Röm. Grundverf. § 22.

(*h*) For instance, fr. 1. D. 24. 1.—fr. 2. pr. D. 28. 6.—Comp. *Cicero*, Top. c. 5.—*Richter* de moribus majorum. Leipsic, 1744.

the opinions and usages of the people; and the *res judicatæ*, or *auctoritas rerum perpetuo similiter judicatarum*, that law of custom which was formed by uniform judicial decisions in similar cases, and which at present is called by the Germans, the *practice*, or the *judicial usage* (*usus fori*); by the French, *la jurisprudence des arrêts*.[a] The most important influence, however, upon the establishment of the law of custom, as well as upon the adaptation of the law in general to the times, was exercised during this period by the prætors and other higher magistrates through their edicts, and by the lawyers by means of their commentaries and their practical application of it to cases. We have now therefore to treat more fully both of the edicts and legal opinions.

B. Edicts of Magistrates.

1. *Prætors.*

§ 30. The supreme judicial power was originally vested in the kings, and afterwards in the consuls, who exercised it personally.[b] After the year A. U. C. 387, however, a new magistrate for the supreme administration of civil justice was established at Rome, under the title of *prætor urbanus*, who at first was chosen only from the patrician ranks, but afterwards (since A. U. C. 418) also from the plebeians.[c] His jurisdiction was at first restricted to cases in which both parties were Roman citizens (*inter cives jus dicebat*); but the continual increase of strangers residing at Rome, led to the appointment of another prætor, about a century later (A. U. C. 508), to decide in cases of lawsuits of the non-Romans among themselves or with Romans (*qui inter cives et peregrinos jus dicebat*), and who was called *prætor peregrinus*.[d] The office of the prætor continued only one year. In the municipal towns of Italy, the civil jurisdiction was lodged in their corporations; but in the provinces, it was administered by the *præses provinciæ*: in later times, especially after Hadrian, it was conferred on special *juridici*, in Italy as well as in several of the provinces.[e]

2. *Edicta Prætorum.* (*f*)

§ 31. The prætors soon acquired a decisive influence upon the

(*a*) fr. 38. D. 1. 3.—*Zepernick* de rerum perpetuo similiter judicatarum auctoritate; in his Animadvers. et opusc. Halle, 1776. No. 7.—*Seuffert*, Erörterungen. Vol. 1. p. 31.

(*b*) fr. 1. 16. D. 1. 2.—*Livy*. I. 26. II. 1.

(*c*) *Livy*, VI. 42. VII. 1. VIII. 15.—*Heinec.* Antiq. Rom. I. 2. § 18–22. — *Van Beerenbrock*, Diss. de Prætoribus. Liege, 1826. (Reviewed by *Zimmern* in Schunck's Jahrb. Vol. 4. p. 303.)—*Hüllmann*, Röm. Grundverf. § 27.

(*d*) fr. 2. § 29. D. 1. 2.—*Theoph.* ad § 7. J. 1. 2.—*Lydus* de magistratibus populi Romani. I. 38. 45.—*Conradi* de prætore peregrino; in Parergis. Helmstedt, 1740. p. 1.

(*e*) See *Zimmern*, R. G. Vol. 3. § 2–25. *Savigny*, R. R. in M. A. Vol. 11. p. 1.—*Dirksen*, Script. hist. Aug. l. c.

(*f*) *Heinec.* Antiq. Rom. I. 2. § 23, 24.—*Hau-*

private law through their edicts. The proper Roman law (*jus civile*) was never applicable to other than Roman citizens. But when the Romans extended their power over all Italy and many countries beyond it,[a] their frequent intercourse with non-Romans led them to acknowledge and apply a universal natural law (*jus gentium*), in addition to their old national law distinguished by its strict principles and proper forms (*jus civile*). At first the jus gentium, or that system of general law principles acknowledged by the civilized nations of antiquity,[b] was only referred to on account of the non-Romans; but its use was soon extended to the Romans also. In consequence thereof, the old strict civil law of the Romans gradually approximated to the universal natural law. This change was induced and effected chiefly by the edicts of the prætors,[c] who, at their entrance upon office, published an edict, in order to defend themselves in the performance of their judicial duties, against the charge of injustice and partiality, as well as against the interceding of the tribunes; that is, they made known by a public placard, those legal principles in accordance with which they would administer law and justice, and the mode of proceeding which they would observe during the year of their office ("*ut scirent cives, quod jus de quaque re quisque dicturus esset, seque præmuniret*").[d] By these edicts they seldom introduced new law principles, but generally confirmed those which were already established by custom and usage, or which were at least considered so, by public opinion or by legal views prevailing at the time. But wherever they found deficiencies in the existing law, or deemed it no longer applicable to

bold, Inst. hist. dogm. § 170 seqq.—*Hugo*, R. G. p. 414 seqq.—*Savigny*, R. R. in M. A. Vol. 1 p. 3.—*Schrader*, Civ. Abh. p. 54.—*Rosshirt*, Tendenz des prätorischen Edicts. Erlangen, 1812.—*Zimmern*, R. G. Vol. 1. § 37–41.—*Reddie* de edictis Prætorum. Specimen 1. Gottingen, 1825. See also: Incerti auctoris magistratuum et sacerdotium populi Romani expositiones inedita. Edited with notes by Huschke. Breslau, 1829. p. 57–65. *Puchta*, Inst. p. 513 seqq.—As Huschke very correctly remarks, many of the rights contained in the power of the prætors were conferred upon them by the Lex Æbutia, which introduced new rules of proceeding; but it is not probable that the rights to establish *præjudicia*, to introduce new actions, to grant *præscriptiones* and *exceptiones*, *missiones* and *restitutiones*, were conferred upon them by that law; as they naturally grew out of the prætorian *imperium* in its different departments. In like manner the authority of the *edictum* did not depend upon the rules introduced by that law, but was merely a product of the preventive tendency of the jurisdiction which was common to the prætors and other principal magistrates. The foregoing remarks apply equally to the *bonorum possessio*.

(*a*) *Hugo*, R. G. p. 336.—*Niebuhr*, Röm. Gesch. Vol. 3. p. 727.

(*b*) § 1. J. 1. 2.—fr. 9. D. 1. 1.—See below § 113.

(*c*) *Theoph.* Paraphr. ad § 7. J. 1. 2.

(*d*) fr. 2. § 10. D. 1. 2. That the prætores and ædiles curules were *entitled* to issue edicts, is proved with great certainty by *Gaius*, I. 6.—*Cicero* ad Attic. 61. de invent. 2. 22.—*Auctor ad Herennium*, 2. 13.—Heineccius is therefore mistaken, when he alleges that they had *usurped* the legislative power by their edicts, and overthrown the jus civile by their artifices. They deserve praise rather than blame for their efforts to ameliorate the rigour of the jus civile, by establishing and applying sound principles of equity. Indeed, it may be remarked, that through the exercise of the equitable powers included in their jurisdiction, they laid the foundation for all the future development of the Roman law.—See *Ritter* ad Hein. l. c. § 17; *Bach*, Hist. jur. II. 2. § 9–12; and especially *Hugo*, R. G. p. 336.

their times, they established and announced the rules which they would follow in their decisions.[a] They directed their efforts most particularly to soften more and more the rigour of the jus civile, so that it might harmonize with the *æquitas* (equity).[b] This they effected, partly by granting *exceptiones* and *præscriptiones* against actions supported by the jus civile, where it would have been *iniquum* (against equity) to condemn the defendant; and partly by *declaring invalid* transactions which would have been valid by the jus civile *(restitutiones)*, or by *supposing* certain facts to exist which did not *(fictiones)*, whenever causes of equity required.[c]

§ 32. That edict which the prætor, on assuming his office, published as the rule by which he would be guided during his term of office in all cases which might occur, was called simply *edictum*, or *edictum annuum*, or *edictum jurisdictionis perpetuæ causa propositum*, and therefore also *edictum perpetuum*.[d] The title *prætoris edictum* was common to the edicts of both the prætors of Rome, while those of the proconsuls and proprætors in the provinces were severally called *edictum provinciale*. Every prætor, however, did not publish an entirely new edict; but generally on his accession to office, he retained the greater part, if not the whole of the edicts of his predecessors (*edictum tralatitium*), as far as they had been approved by experience; and made only such additions and alterations as appeared to him to be required by, and suitable to the times and circumstances.

3. *Ædiles.*

§ 33. As the administration of justice was intrusted to the prætors, so the care of the police was committed to the *ædiles*. There were originally only *ædiles plebis* (§ 22); but afterwards *ædiles curules*

(*a*) Therefore *Papinian* says, in fr. 7. § 1. D. 1. 1: The prætors had introduced their law, "adjuvandi, vel supplendi, vel corrigendi juris civilis gratia, propter utilitatem publicam."—*Holtius*, Oratio de jure prætorio ad jus civile supplendum et emendandum optissimo; in Annalibus Academicis. Groningen, 1820, 21.

(*b*) *Æquitas* in this meaning is not indefinitely *equity*, but equitable law, *jus æquum*, generally acknowledged as such and resting upon law principles, as opposed to *jus strictum* or *jus civile*; for instance in fr. 2. § 5. D. 39. 3. Paulus concludes, in a case where no action could have been maintained by the law, that it should be supported because *equity* required it, saying "hæc *æquitas* suggerit, etsi *jure* deficiamur."—See Juridisches Archiv. Vol. 5. No. 3.—*Welcker*, Jur. Encyclop. p. 137. note 22.—*Schultz*, R. St. W. § 43–45. And among the later writings, *Albrecht's* römische Æquitas. Dresden, 1834. *Mühlenbruch*, Doct. Pand. I. 43. *Rosshirt*, Civ. R. I. § 15.

(*c*) *Gaius*, IV. 34 seqq. 57. 116. 117. 119.—pr. § 1–6. J. 4. 13.—*Zimmern*, R. G. Vol. 3. § 91. 96. 101.

(*d*) It was not under Hadrian, as has been supposed by some, that the prætorian edict was first called *edictum perpetuum*. The edictum perpetuum is nothing more than the edictum annuum. *Asconius Pedianus* ad Cic. orat. Pro Corn. maj. reo.—*Hugo*, R. G. p. 416. 417.

(*e*) The *edicta repentina* or *prout res incidit*, which are usually opposed to the edictum perpetuum (fr. 7. pr. D. 2. 1.) have no reference whatever to legislation, but were merely decrees of the prætor in single suits; thus for instance the *edicta peremtoria* in fr. 68–70. D. 5. 1.—const. 8. C. 7. 43.—*Schweppe*, R. R. G. § 552.—*Zimmern*, R. G. Vol. 1. § 37. Note 7.—*Mühlenbruch*, Doct. Pand. § 5. —*Brissonius* de verb. signif. v. edictum.—Puchta considers the term *edicta repentina*, to have originated from a wrong interpretation of Cicero, Verr. III. 14.

were also appointed from the patricians (A. U. C. 387).[a] The latter, like the prætors, were entitled on entering upon their office to publish an edict,[b] which indeed chiefly consisted of prescripts and regulations in matters relating to the police and markets; but they were, in some measure at least, important also for the private law.[c] The law introduced by the prætors and ædiles is called *jus honorarium*.[d]

C. Opinions and Writings of the Lawyers.

1. *Responsa Prudentum.*

§ 34. After the main law principles had been established by the Twelve Tables and the Prætorian Edicts, the lawyers began to develope them more fully by interpretation,[e] so as to render them more completely adapted to practical purposes; and at the same time they settled the forms to be observed in the application of these principles. Any one therefore who had to perform legal transactions, was under the necessity of applying to a lawyer for advice and assistance. Upon such application, the lawyer either merely gave him his opinion (*responsum*); or else, as his advocate, he prosecuted or defended his cause before the court (*disputatio fori*);[f] or gave him directions how to conduct his suit at law or construct the forms of his legal transactions. By these as well as by their literary comments upon the law in general, many legal maxims and principles were gradually formed. In this manner the lawyers exercised an influence upon the improvement of the law, of equal importance with that of the prætors and the ædiles themselves.[g] The law thus introduced by the jurists was called *auctoritas prudentum*, *jus receptum*, *sententiæ receptæ*, and also *jus civile* in the strictest meaning of the term.[h]

(*a*) *Livy*, lib. 7. c. 1.—*Pomponius* in fr. 2. § 26. D. 1. 2.—*Heineccius*, I. 2. § 25–27.—See also the writings referred to § 22. note *a*. For the time of the introduction of this office see *Schilling*, Bemerkungen zur Rechtsgeschichte p. 92.

(*b*) § 7. J. 1. 2.—*Theophilus* ad § 8. J. 1. 2.

(*c*) For instance, the *actio redhibitoria* and *quanti minoris*, which continue to be applicable, originated through the edict of the ædiles. Dig. 21. 1. see also fr. 27. § 28. D. 9. 2.

(*d*) Undoubtedly called so "ab honore prætoris," that is, from the public offices with which the prætors and ædiles were invested, and from which that law issued; and hence signifying *law by the magistrates*. § 7. J. 1. 2.—fr. 2. § 10. D. 1. 2. Also fr. 7. § 1. D. 1. 1. cannot be taken in any other meaning. See *Westemann's* Theophilus. Vol. 1. p. 32.—*Hugo*, Rechtsgeschichte p. 417.—*Rochay de la Renay*, De juris honorarii auctoritate in jure Romanorum privato. Leyden, 1827.

(*e*) See *Puchta*, l. c. p. 309 seqq.

(*f*) fr. 2. § 5. D. 1. 2. It is doubtful, what the *disputatio fori* meant, which Pomponius speaks of here. Probably, however, it is nothing else than discussion or argument before a court. Respecting the different views of the jurists, see *Heineccius* l. c. I. 2. 35.—*Bach*, Hist. jur. lib. 2. c. 2. sect. 5. § 1.—*Hipfner* Comm. § 57. not. 3.—*Moser*, Disputatio fori; in his Versuche über einzelne Theile des Rechts. No. 1.—*Glück*, Handbuch über Günther, &c. § 38.—*Haubold*, Inst. hist. dogm. § 197.—*Hugo*, Rechtsgeschichte. p. 442.—*Zimmern*, Rechtsgeschichte. Vol. 1. p. 57.—*Hepp*, Diss. philol. jurid. exhibens interpretationem L. 2. § 5. D. de orig. jur. Heidelberg, 1826. (Reviewed by *Witte*, in the Tübinger kritische Zeitschrift für Rechtswissenschaft. Vol. 4. p. 340. and by *Zimmern*, in Schunck's Jahrbücher. Vol. 4. p. 605.)—*Schilling*, Bemerkungen über Röm. Rechtsgeschichte. p. 123.

(*g*) *Heineccii* Antiquitates. Lib. 1. tit. 2. 29–37.—*Schweppe*, Rechtsgeschichte. § 75 seqq.

(*h*) *Jus civile* signified with the Romans: 1. The *positive* law of any state (jus civitatis

2. *Legal Writings.*

§ 35. There are, however, but very few traces of legal works of a strictly scientific character to be found in this period. At first, only the patricians and pontifices had an intimate acquaintance with the existing law, and especially with the system of actions, the forms of proceeding (*legis actiones*),[a] and the times at which the courts were held (*dies fasti et nefasti*).[b] They are said to have carefully concealed all these for a long time, in order to secure their ascendency over the plebeians,[c] until a clerk of the lawyer Appius Claudius, named Cn. Flavius (A. U. C. 449), published a book in which Claudius had composed and arranged the legis actiones. From him the book was called *Jus Flavianum*.[d] This same Flavius afterwards arranged and published a calendar or list of the dies fasti, which he had learned by repeated inquiries from Appius Claudius.[e] Thenceforward the plebeians also devoted themselves to the study of law. Tiberius Coruncanius, the first of the plebeians who received the pontificate (A. U. C. 452), is also said to have been the first who taught law publicly.[f] When in the lapse of time, as the law had become developed more and more, new forms of actions and transactions were brought into use, a lawyer of the name Sextus Ælius Catus composed a book containing these new forms (*alias actiones composuit*),[g] which he published about the year A. U. C. 552. This book was called, from his name, *Jus Ælianum*.[h]

proprium, quod quisque populus ipse sibi constituit). fr. 6. 9. D. 1. 1.—§ 1. J. 1. 2.—2. By way of distinction, the positive law of the *Roman* state, as opposed to the jus gentium. See also *Cicero*, Top. c. 5.—3. In a more restricted sense, *all* the Roman law except the jus honorarium; consequently the *leges, plebiscita, senatusconsulta, auctoritas prudentum*, and afterwards likewise the *constitutiones principum*. fr. 7. D. 1. 1.—4. In the most restricted acceptation of the word, only the *auctoritas prudentum* and the *disputatio fori*. fr. 2. § 5. 12. D. 1. 2.

(*a*) fr. 2. § 6. D. 1. 2.—fr. 77. fr. 123. pr. D. 50. 17. and especially *Gaius*, VI. 11–30. See *Hüpfner* on the legis actiones and actus legitimi. (3d Appendix to his Commentary.)—*Ram* de legis actionum origine et progressu. Utrecht, 1804; and especially *Dirksen*, Beiträge zur Kunde des röm. Rechts. Leipsic, 1825. p. 221.—*Van Hasselt* de legis actionibus. Groningen, 1824.—*Olsen* de legis actionibus. Part 1 and 2. Copenhagen, 1825 and 27.—*Heffter*, Institutionen des Civilprocesses. p. 76 seqq. Idem, Gaii comm. IV. in observat. cap. 1–6.—*Klien* de ratione jurisprudentiæ formularis generali. Leipsic, 1829.

(*b*) In the Roman calendar those days were distinctly marked, on which the tribunals were open (*dies fasti*), entirely closed (*dies nefasti*), or open only for a part of the day (*dies intercisi*). Therefore *Ovid* says in his Fasti, I. 47:

"Ille nefastus erit per quem *tria verba* silentur:
Fastus erit per quem *legis* licebit *agi*."

The tria verba are the words: "Do, dico, addico," by which the extent of the judicial power of the prætors used to be denoted. *Varro* de lingua Latina lib. 5. cap. 4.—*Elvers* de fastis, in ejus clarissimis monumentis. Rostock, 1835. § 3.

(*c*) fr. 2. § 6. D. 1. 2. and fr. 2. § 35. ibid.—*Cicero* de leg. lib. 2. cap. 19. pro Murena c. 11. ad Attic. 6. 1.

(*d*) *Pomponius* (fr. 2. § 7. D. 1. 2.) says: "*Subreptum* librum populo tradidit."—*Pliny*, Histor. nat. lib. 33. cap. 1. "*cujus hortatu* exceperat eos dies."—*Livy*, IX. 46, simply states the fact of its having been made known.—According to *Cicero* pro Murena. c. 11. and ad Attic. 6. 1. the lawyers were said to have been much vexed at this; but Flavius became so popular, that he was appointed tribune, senator, and ædilis curulis. *Pomponius*, l. c.—*Niebuhr*, Röm. Geschichte. Vol. 3. p. 376 seqq.

(*e*) See *Hugo*, R. G. p. 449 seqq.—*Schilling*, Bemerk. p. 124–129.

(*f*) *Pliny*, Hist. nat. XXXIII. 1.

(*g*) fr. 2. § 35. D. 1. 2. *Schrader*, in Hugo's Civ. Mag. Vol. 5. p. 187.

(*h*) fr. 2. § 7. i. f. D. 1. 2. The same Sextus Ælius wrote also an abridgment of the Jus Civile under the title *Tripertita*. fr. 2. § 38. ibid.

The first expositions of law of a scientific character found in this period, are the *commentarii juris civilis* and *responsa* of the elder Cato:[a] besides whom may be noticed his son, Marcus Porcius Cato,[b] and the three lawyers of whom Pomponius says, that they had written many books on the jus civile, and laid the foundation for its scientific exposition (*qui fundaverunt jus civile*): Publius Mucius Scævola, Marcus Junius Brutus, and Manilius,[c] to the last of whom the *actiones Manilianæ*, or the forms of contracts of sale, are attributed;[d] likewise Lucius Crassus, brother of P. M. Scævola;[e] Q. Mucius Scævola, surnamed Augur, son of the above-mentioned P. M. Scævola;[f] and Hostilius, who composed the *actiones Hostilianæ*, which probably were forms of testaments.[g]

THIRD PERIOD.

From Cicero to Alexander Severus.*

(A. U. C. 650—1000, or from 100 before to 250 after Christ.)

Change of the political Condition of Rome.

§ 36. In the beginning of this period, the state of Rome was still nominally republican; but in fact, it was governed by single rulers with monarchical powers. When Cæsar Octavianus had conquered Anto-

(*a*) fr. 2. § 38. D. 1. 2.—*Livy*, XXXIX. 40.—*Cicero* de Orat. I. 37. II. 33.—*Festus* v. Mundus.

(*b*) fr. 2. § 38. D. 1. 2.—*Brillenburg* de jurisprudentia Catonis censoris. Leyden, 1826.

(*c*) fr. 2. § 39. D. 1. 2.—*Haubold*, Inst. jur. dogm. § 193.

(*d*) *Varro* de re rust. II. 5.

(*e*) fr. 2. § 40. D. 1. 2.—*Cicero* Læl. c. 1. pro Balb. c. 20.—*Valer. Max.* VIII. 12.

(*f*) fr. 2. § 41. D. 1. 2. See also Cicero de Orat. I. 39.

(*g*) *Cicero* de Orat. I. 57.—*Burchardi*, Gesch. u. Inst. § 45–47.

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* On the decay of the religious institutions, which followed the dissolution of the republic, the people began to join to their old forms of worship many Egyptian and Grecian superstitions, notwithstanding the prohibitions of the emperors Augustus and Tiberius; and among the more enlightened classes, implicit belief gradually gave way to a philosophical religion. Religion had almost entirely lost its political influence, and even in the private law only slight traces of its effects are visible. The private law underwent many alterations in consequence of the restoration of the monarchical form of government; yet no thorough change was wrought in it during the earlier part of this period. Although decrees continued to be made by the people, the jus civile received its alterations less from them than from the edicts of prætors and the decrees of the senate. The most important of the decrees of the people and senate, during this period, which at the same time furnish the most convincing proof of the low state of public morals, were: 1. The *lex Julia et Papia Poppæa*, which was enacted under Augustus, and continued in force till Constantine, intended to prevent celibacy and to promote population. 2. The *lex de adulteriis*, which inflicted severer punishments on adulterers. 3. The *lex Ælia Sentia* and *Spuria Camilla* intended to restrain the manumission of slaves. And, 4. The *Sctum Claudianum*, which was designed to prohibit illicit intercourse between free women and slaves. The three latter continued in force till the time of Justinian. The decrees of the people became more rare, as the right of Roman citizenship was extended, and the number of the imperial constitutions were increased; until at length they entirely ceased to be made. The difference between decrees of the people (*populiscita*) and of the plebeians (*ple-*

nius in the battle of Actium (B. C. 32), he became as *princeps reipublicæ*, under the surname *Augustus*, the sovereign of the state, by uniting in his person the most important of the old republican dignities.[a] He, indeed, generally observed the old republican forms; but under his successors even these forms gradually disappeared, the power of the *principes* (or emperors) became more and more absolute, and finally it degenerated into the most oppressive despotism.[b] The right of legislation was transferred by degrees from the people to the

(*a*) He had the *tribunitia potestas* and the *proconsulare imperium*; he was also *imperator, præfectus morum*, and *pontifex maximus*, and was frequently invested with the consulate. *Dio Cass.* LIII. 16–19. *Ferguson's* Rome B. 6. c. 2. *Gibbon's* Rome. chap. 3. The effects of this political change were most apparent in the altered condition of the treasury (ærarium populi Romani,—fiscus Cæsaris).

(*b*) *Tacit.* Annal. I. 1 seqq.

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biscita) almost entirely disappeared after the time of Cicero; as the distinction between patricians and plebeians no longer existed. The *responsa prudentum* acquired in this period a still higher degree of authority, because the legal opinions of the authorized jurists, when unanimous, had the force of laws. It is also worthy of remark, that not only the literary productions of the jurists, but also the study of the law itself, advanced to a far higher degree of scientific perfection than they ever had attained before. The prætors still continued to enlarge the jus civile, by borrowing more and more from the jus gentium, until the revision of the prætorian edict under Hadrian (A. D. 130); when the edict, which had been gradually improving for centuries, was at length regarded as complete. The literary activity of the jurists became, on the other hand, so much the more conspicuous; the edict being the chief source of the later law, their attention was principally directed to commenting on it. And, indeed, the abundant collection of materials which had been amassed, needed only to be elaborated, in order to render it more practically useful. This task was executed with the greatest ability by the classical jurists of the second and third centuries. But when, at the close of this brilliant epoch of literary productiveness, the Roman empire fell into barbarism; all the scientific vitality of jurisprudence ceased, and an age of incapacity and barrenness succeeded. At first, the emperors issued edicts after the example of the republican magistrates; and, besides the privilege of giving decisions and rescripts, they had the right of proposing general laws, in the senate: but with the gradual increase of the imperial power and the decreasing importance of the senate, the assent of the latter to the imperial projects of laws was demanded more imperiously, until at length it was dispensed with altogether. The constitutions of the emperors, which in this period formed a new (and from Constantine to Justinian, the exclusive) source of the private law, had, until the time of Constantine, the character of decisions (*decreta*) and instructions (*responsa*); but under Constantine, they assumed the form of universal decrees (*edicta, leges edictales, leges*), and began not only to be very numerous, but also to contain such new and extensive regulations as were required by the state of the times, and especially by the spread of Christianity. It would be difficult to determine whether the ignorance and imbecility of the later jurists should be regarded as the cause, or as the consequence, of that exclusively imperial legislation which had now checked the course of all the more natural sources. This state of things was doubtless owing, in great measure, to the barbarous spirit of the age, which the introduction of Christianity was for a long time unable to subdue. To the old magistrates, the choice of whom rested with the senate, were added, among others, the *præfectus prætorio*, the *præfectus urbi*, and the *quæstor candidatus principis*. The quæstor brought the propositions and motions of the emperors before the senate; to the præfectus urbi were committed the police and criminal jurisdiction of Rome and its environs; the præfectus prætorio, although at first merely the commander of the body-guard, became, through the influence he exercised in the choice of emperor, the most important officer of the state in the administration both of the government and of justice.

emperor, whose *constitutiones* soon began to form a new source which amply supplied the public as well as private law. This political change in the state was produced by the civil wars, which were caused: 1. by the renewal of the motion to distribute the public lands;[a] 2. by the extension of the rights of Roman citizenship to all the inhabitants of Italy;[b] 3. by the efforts of the aristocracy to increase the political authority of the senate and of the equites, so as to overbalance the power of the people.[c] Corruption of morals, contempt of religion and established institutions, public despotism, and private violence, all combined to destroy the power and influence of the government. All efforts to revive the languishing spirit of the old republic, were vain and fruitless.[d]

LAW SOURCES OF THIS PERIOD.

I. Decrees of the People.

§ 37. The department of private law in this period, received its alterations and improvements from: 1. the decrees of the people; 2. those of the senate; 3. the *constitutiones principum*; 4. the *edicta prætorum*; 5. the *responsa prudentum*; and 6. the writings of the law commentators.

1. The decrees of the people, which still continued to be either *leges* or *plebiscita* (§ 26 and 27), were never made in greater numbers than during the civil wars which in the beginning of this period subverted the state.[e] There are among them many which were, and long continued to be, important to the private law;[f] for this reason in later times copious commentaries were written upon them by the classical jurists (§ 44). But the more the principate (the supreme power of the principes) was transformed into an absolute

(*a*) *Appian* de bell. civ. I. 7. 8. *Plutarch*, T. Gracch. 8. 9. *Florus*, III. 13. *Varro* de re rust. I. 2. § 9. *Niebuhr*, Röm. Gesch. Vol. 2. p. 694.—Rhein. Mus. Vol. 5. p. 329. Vol. 6. 137. 376.—*Walter*, G. R. R. p. 267 seqq.—*Puchta*, Inst. p. 270 seqq.

(*b*) *Appian*, I. 21. 23. 34–39. 49. 53. 64–67. *Plutarch*, C. Gracch. 5. 8. By this the Roman law became at once the general law through all Italy. *Puchta*, Inst. § 64.

(*c*) *Appian*, I. 22. 35.—*Plutarch*, T. Gracch. 17. C. Gracch. 5. Pompeius 22.—*Zachariä*, L. Cornelius Sylla. Heidelberg, 1834.—*Wittich* de reipublicæ Rom. ea forma, qua Sylla rempublicam commutavit. Leipsic, 1835. See also *Göttling*, Röm. Gesch. § 460 seqq.; *Puchta*, Inst. p. 265 seqq.; and especially *Danz*, R. R. G. § 42–44.

(*d*) *Drumann*, Geschichte Rom's, in seinem Uebergange von der republicanischen zur monarchischen Verfassung (History of Rome in her change from a republic to a monarchy). 4 Vols. Konigsberg, 1834.—*Höck*, Röm. Gesch. Vol. 1.—*Gibbon*, chap. 5.

(*e*) "Corruptissima republica plurimæ leges," says *Tacitus* in Annals III. 27.

(*f*) The most important among the decrees of the people in this period is undoubtedly the *lex Julia et Papia Poppæa*, made under Augustus. In regard to this law, see *J. Gothofredus*, Quatuor fontes juris civilis. Geneva, 1653. (and in Otto's Thesaurus. Vol. 3.) *Ramos* ad leges Juliam et Papiam; in Meermanni Thes. Vol. 5. p. 1.—*Heinec.* Comm. ad l. Jul. et Pap. Popp. Amsterdam, 1726.—*Bach*, Hist. jur. lib. 3. c. 1. § 7 and 8.—*Hugo*, R. G. p. 755.—*Zachariä*, R. G. p. 212.—*Zimmern*, R. G. Vol. 1. § 33, 172, 175.—*Schilling*, Bemerk. p. 295–317.—*J. J. Keuker*, Diss. de restitutione legis Juliæ et Papiæ Poppææ. Liege, 1830. See also *Haubold*, Inst. lit. Vol. 1. p. 317.—*Puchta*, Inst. p. 506.—*Burchardi*, Gesch. u. Inst. p. 234.—*Falck*, Jurist. Encyclop. 3d Ed. p. 125.

sovereignty, the fewer became the decrees of the people; and towards the close of this period, they cease to be mentioned.[a]

II. Decrees of the Senate.

§ 38. The decrees of the senate (§ 28) increased in number as those of the people decreased, and acquired in this period a much greater importance than they ever had before.[b] They now began to be named after either the consul who had proposed them;[c] or the emperor himself, who made the motion in writing (*per epistolam*) or orally (*ad orationem*);[d] and sometimes after the person who had occasioned them.[e]

III. Constitutiones Principum.

§ 39. A third source of the private law was formed during this period by the *constitutiones principum*. When the state of Rome had ceased to be a republic, in fact though not in form, and several of the highest offices were united in the person of the *princeps* for his lifetime, he began, in imitation of the ancient republican magistrates, to issue ordinances and regulations by virtue of the power conferred on him.[f] Such ordinances were called *placita* or *constitutiones principum*.[g] When appeals from the ordinary courts came to be made immediately to the emperors, they were soon induced to appoint a body composed of the higher state officers and jurists, to which they transferred the cases and questions presented to them for decision or opinion. This was called *auditorium principis*;[h] and it soon became the supreme

(*a*) *Zimmern*, R. G. § 21.—*Rudorff*, in the Z. f. gesch. R. W. Vol. IX. No. 3.

(*b*) *Augustinus* l. c. (§ 28 note *d*).—*Geertsema*, Diss. de senatus Rom. auctoritate, præsertim sub imperatoribus. Groningen, 1824.

(*c*) For instance: *Senatusconsultum Silanianum* under Augustus—*Sctum Velleianum* under Claudius—*Sctum Trebellianum* under Nero—*Sctum Pegasianum* under Vespasian.

(*d*) E. g. several *Scta Claudiana*—*Sctum Neronianum*.—*Dirksen*, Vermischte Schriften. Berlin, 1841. 6th Treatise.

(*e*) For example: *Sctum Macedonianum*, called so after a certain Macedo who killed his father, in order to satisfy his creditors.—*Theoph.* Paraphr. ad § 7. J. 4. 7.—fr. 1. D. 14. 6. However, this seems to have been the only instance. *Hugo*, R. G. p. 738, 775.—At this time the senate was the moderating power over the princeps, as it had formerly been over the tribunes. *Burchardi*, Gesch. u. Inst. § 101–109.

(*f*) *Löhr*, Uebersicht der Constitutionen, in the 2d Programme, p. 7.—*Hugo*, R. G. p. 740.—*Zimmern*, R. G. Vol. 1. § 44 and 45.

(*g*) fr. 1. pr. D. 1. 4. "*Quod principi placuit*, legis habet vigorem; utpote cum *lege regia*, quæ de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat."—*Gaius*, I. 5: "Constitutio principis est, quod imperator decreto, vel edicto, vel epistola constituit; nec unquam dubitatum est, quin id legis vicem obtineat, cum ipse imperator *per legem* imperium accipiat." § 6. J. 1. 2.—On the *lex regia* see *Heinec.* Antiq. Rom. I. 2. § 62–67, where a fragment of this law is to be found.—*Bach*, Hist. jur. lib. 3. c. 1. § 3 seqq.—*Haubold*, Inst. jur. dogm. § 57. note 6.—*Hugo*, R. G. p. 720.—*Zachariä*, R. G. p. 210.—*Zimmern*, R. G. Vol. 1. § 43.—*Schilling*, Bem. p. 291.—*Schrader*, in the Tüb. krit. Z. Vol. 3. p. 181.—*Huschke*, ibid. Vol. 5. p. 237.—*Hepp*, in Elver's jur. Zeit. 1830. p. 265.—But especially *Niebuhr*, Röm. Gesch. Vol. I. p. 381. *Cicero* de Repub. II. 13. 17. 18. 21. likewise *Walter*, G. R. R. p. 281. note 47. *Huschke*, in Richter's Z. 1837. Vol. 1. p. 425. *Puchta*, Inst. p. 375.

(*h*) This imperial council was engaged in the political as well as the judicial administration; and was, with respect to the former in particular, called *consistorium principis*. See *Haubold* de consistorio principum Romanorum; in ejusdem Opusc. Ed. by Wenck. Vol. 1. Nos. 4, 5.—*Savigny*, R. R. in M. A. Vol. 1. p. 79.

court for the whole empire. Its sentences and decisions, issued in the name of the emperor, were called *decreta;* and its legal opinions, given either to private persons or officers, *rescripta* (§ 50).[a]

IV. Edicta Prætorum.

§ 40. The prætors and ædiles of Rome, as well as the proconsuls and proprætors in the provinces, continued during this period to publish edicts on entering upon their offices. As, however, many of them probably took the liberty to deviate from them during their term of office, the tribune Cornelius (A. U. C. 687) procured the passage of a law: *ut prætores ex edictis suis perpetuis jus dicerent* (that they should administer the law in accordance with their edicts).[b] After this, the edicts still underwent some alterations, though not so many as formerly, and their importance as a source of private law was much reduced.

Comments on the Prætorian Edict.—*Ofilius.*

§ 41. The prætorian Edict formed for a long time a chief source of the private law, and for this reason it became a subject of literary disquisition and instruction. The want of uniformity in its plan, and the disregard of coherence shown in its gradual alteration and enlargement, rendered it necessary to reduce it to something like a system—to remove what was obsolete, to connect what was related, and to divide the whole under proper heads. The first who undertook this labour, was *Ofilius*,[c] a friend of Julius Cæsar; for Servius Sulpicius, the tutor of Ofilius, had only written a brief abridgment of the prætorian law.[d]

New Revision of the Edict, by *Salvius Julianus.* (*e*)

§ 42. However meritorious the labours of Ofilius were, and however useful to his contemporaries, yet they were only the work of a private jurist, and without legal authority. Besides, many additions and alter-

(*a*) *Guyet*, Abh. No. 4. The *decreta* and *rescripta* were from the first considered of great authority. They were generally made known through the *acta diurna*, or daily papers; and may therefore in some measure be compared with the *arrêts* of the kings of France. Respecting the *publication* of the decreta and rescripta, see *Pliny*, Epist. V. 14.; *Madvig* de Asconio Pediano p. 63. note 9; and *Zell*, über die Zeitungen d. alten Röm. (on the newspapers or news-letters of the ancient Romans). Freiburg, 1834. The constitutions may properly be distributed into these 4 classes: 1. the Orationes (addressed to the senate and requiring it to issue senatusconsulta); 2. the Edicta; 3. the Mandata; 4. Rescripta and Decreta. See *Savigny*, Syst. d. R. R. p. 123. 134.

(*b*) *Dio Cass.* XXXVI. 23.—*Ascon. Ped.* ad Cic. pro Cornel. maj. reo.—*Heinec.* Antiq. Rom. § 23.

(*c*) *Pomponius* says of him, in fr. 2. § 44. D. 1. 2.: "Edictum prætoris primus diligenter composuit."

(*d*) "Ante eum (Ofilium) Servius duos libros ad Brutum perquam brevissimos ad Edictum subscriptos reliquit." *Pomponius*, l. c. See also fr. 5. § 1. D. 14. 3.

(*e*) Comp. especially *De Weyhe* libri tres edicti, seu libri de origine fatisque jurisprudentiæ Romanæ, præsertim edicti prætoris ac de forma edicti perpetui. Celle, 1821.—*Hefftter* über die Oeconomie des Edicts, in the Rhein. Mus. Vol. 1. p. 51.—*Tigerström* de ordine Digestorum. p. 462 seqq.

ations of the Edict were afterwards made, so that a revision of it by public authority was urgently needed. No revision, however, was effected until the time of Hadrian, when it was undertaken by *Salvius Julianus*, who was peculiarly qualified for the work:[a] for he was not only eminently distinguished for his learning as a jurist,[b] but was also prætor;[c] at least he had been nominated[d] to that office at the time when he began this work, which he undertook by order and under the authority of Hadrian. He thus enjoyed much greater liberty than a private lawyer; being authorized to omit, to amend, and to add. The plan he seems to have followed was this: 1. to retain all of the edicts of the prætors, as far as they were applicable to his time, in as brief a form as possible;[e] 2. to reject all that was obsolete; 3. to make such corrections and additions as the circumstances of the times required;[f] and, 4. to arrange the whole under the proper heads.[g] In this composition most probably, the edict of the prætor urbanus was united to that of the prætor peregrinus;[h] since both had particular reference to the private law: but the edict of the ædiles, which related chiefly to the police, was retained separately in an appendix.[i] Hadrian caused this new revision to be confirmed by a special decree of the senate (A. D. 131).[k] From that time the edict remained substantially the same, and became a principal subject of legal tuition.[l] Julian himself wrote commentaries upon it,[m] and after him many others, among whom Ulpian[n] deserves especially to be mentioned.[o]

(*a*) Of him also it is said "Perpetuum composuit edictum." *Eutrop.* VIII. 17.—*Aurel. Victor* de Cæsar. c. 19. speaks erroneously of the emperor Didius Julianus: "qui primus edictum quod varie inconditeque a prætoribus promebatur, in *ordinem* composuerit." *Justinian* likewise mentions the *compositio edicti*, comparing it with his compositions in the Constitutio *Tanta* de confirm. Dig. § 18. (Cod. 1. 17.)—*Biener*, Comm. de Salvii Juliani meritis in edictum prætorium recte æstimandis. Leipsic, 1809.—*Hugo*, R. G. p. 795 seqq. —*Zimmern*, R. G. Vol. 1. § 40.—*Puchta*, Inst. p. 547.

(*b*) His motto shows his fondness for science: "etsi alterum pedem in tumulo haberem, non pigeret aliquid addiscere." fr. 20. D. 40. 5. See however respecting this in Richter's Jahrb. 1838. p. 519.

(*c*) That he was prætor, is shown by fr. 5. D. 40. 2.—*Biener*, l. c. p. 21, is of the opinion that Julian composed the edict after his entrance upon the prætorian office.

(*d*) See Const. *Dedit* de confirm. Dig. § 18. where it is said, "sed et D. Hadrianus piæ memoriæ, quando ea quæ a prætoribus quotannis edicta fuerant, brevi complexus est libello, *adsumpto ad id optimo Juliano*."

(*e*) To this the following words of the above mentioned constitution seem to refer: "brevi complexus est libello."

(*f*) In fr. 3. D. 37. 8. such an alteration made by Julian, is contained, and at the same time referred to the *nova clausula* edicti introduced by him.

(*g*) Justinian himself calls him the *ordinator* edicti Prætorii perpetui.

(*h*) *Theoph.* ad §. 8. J. 1. 2.

(*i*) Const. *Omnem reipublicæ* ad Antec. § 4.

(*k*) Const. *Dedit* de confirmat. Dig. § 18.

(*l*) *Biener* l. c. § 46.—*Wüstemann's* Theophilus. Vol. 1. p. 36 seqq.—*Zimmern*, R. G. § 40.

(*m*) Under the title: Digestorum libri XC.

(*n*) Ulpian wrote among other works 83 libri ad edictum, the last two of which contain the commentary on the Edictum Ædilium; all the others (81) are upon the prætorian Edict.

(*o*) There are only fragments of the Edict left. They are found in *Ranchini* Edictum perpetuum Salvii Juliani restitutum; in *Meerm.* Thes. Vol. 3. p. 235; in *Gothofredus*, Quatuor fontes juris civilis, and copied from this in *Otto's* Thesaurus. Vol. 3. and in *Hoffmann*, Historia juris Rom. Vol. 2. p. 305. The most complete collection is contained in *Wieling*, Fragm. Edicti perpetui. Franecker, 1783. The history of the Edict has been given

V. Responsa Prudentum.

§ 43. From the earliest times, it was a custom among the Romans[a] in doubtful cases, for private individuals, as well as the magistrates themselves, to apply to the jurists and request their opinions (*responsa*) (§ 34). Every jurisconsultus had the liberty to respond on the jus; that is, every lawyer was at liberty to give counsel. Before the time of Augustus, the responsa thus given, though they had not the force of a law, but merely that of a lawyer's opinion, were all of equal authority. Augustus first allowed several distinguished jurists, by special grant, to respond in his name; the natural consequence of which was, that the opinions given by these jurists acquired a greater authority.[b] Hadrian afterwards ordered that the unanimous opinion of the jurists specially authorized to respond, should have the force of a law (*legis vicem*), and should be followed by the judges; but that in case their opinions disagreed, the judge should follow that opinion which he himself considered to be most just.[c] The general liberty of all the other lawyers to respond on the jus was never taken away; and consequently it was not first restored by Hadrian, as some have supposed.[d] The responsa of those jurists, however, who were not authorized by special grant of the emperor, never had the force of law, or any other authority than that of a private jurist.[e]

VI. Commentaries.

§ 44. In the scientific illustration of the law, this period surpassed all others, both for the variety and profundity of its productions;[f] which was owing, in a great measure, to the connexion of law with philosophy and Greek literature. It is distinguished by the most eminent

by *Heineccius* in his Historia edictorum et edicti perpetui; in Opusc. posth. Halle, 1744, p. 1–274, and in Opp. Vol. 7. p. 1–280. —For the literature of the Edict see *Haubold*, in Hugo's Civ. Mag. Vol. 2. p. 285, and ejusdem Inst. lit. Vol. 1. p. 331. The latest attempt to restore the Edict, has been made by Haubold, and is to be found in his Inst. jur. dogm. Epitome. Leipsic, 1821. p. 137 seqq. and in his Inst. jur. lineam. Edited by Otto. Lcipsic, 1826, as an appendix to that work.

(*a*) *Den Tex*, Oratio de insigni honore quo habiti fuerunt, cum philosophi apud Græcos, tum Romæ jurisconsulti. Amsterdam, 1820.

(*b*) Augustus wished to have the responsa given under his authority. fr. 2. § 47. D. 1. 2.

(*c*) *Gaius*, I. 7. Comp. § 8. J. 1. 2. and *Theoph.* ad § 9. ibid.

(*d*) From the passage of Pomponius fr. 2. § 47. D. 1. 2.—*Gravina* de ortu et progressu juris civilis. § 42.—*Van Middelstum*, Diss. hist. critica ad L. 2. § 47. D. de orig. jur. Groningen, 1829.

(*e*) See *Hugo*, R. G. p. 810 seqq.—*Warnkönig* zu Gibbon. p. 118.—*Gans*, Scholien zu Gaius. p. 19.—*Holtius* de auctoritate Ictorum Romanorum; in commentationibus instituti Belgici. Amsterdam, 1822.—*Schrader* on the question: Was gewinnt die Röm. Rechtsgeschichte durch Cajus Institutionen? (Value of Gaius' Institutes with regard to the history of Roman law.) p. 35.—*Du Caurroy*, in the Thémis Vol. 2. p. 17. Vol. 7. p. 62.—Z. f. gesch. R. W. Vol. 4. p. 484.—*Zimmern*, R. G. Vol. 1. § 54 seqq.—*Puchta*, in the Rhein. Mus. Vol. 5. No. 6. Vol. 6. No. 2.

(*f*) *Meister* de philosophia Ictorum Romanorum stoica. Gottingen, 1756.—*Ortloff*, Einfluss der stoischen Philosophie auf die Röm. Jurisprudenz. (Influence of the stoical philosophy on Rom. Jurisprudence.) Erlangen, 1797.—*Zimmern*, R. G. Vol. 1. § 62.—*Cujac.* Observ. XXVII. 40.—*Merillius*, Obs. I. c. 8–27.—*Mühlenbruch*, D. P. § 93.—*Ratjeu*, Einfluss der stoischen Philosophie auf die Pandecten. Kiel, 1839.

jurists that ever existed among the Romans—jurists whose learning, penetration, and sagacity advanced the science of law to a high degree of perfection, and who are therefore usually called the *classical jurists*. Their writings contained excellent explanations and exhibitions of the law sources, and soon obtained a decisive authority in the courts, both because the authors themselves occupied the highest dignities of the state, and because the assistance of learned law interpreters was indispensable in applying the Twelve Tables and the Edict to practice. Under Justinian, the Pandects were compiled from the writings of these jurists.[a]

Celebrated Jurists before Augustus.[b]

§ 45. The most distinguished jurists of this period, before the time of Augustus, were: * Q. Mucius Scævola,[c] Aquilius Gallus, M. Tullius Cicero,[d] Sextus Papirius, Gaius Juventius, Servius Sulpicius Rufus,[e] * Alfenus Varus,[f] Ofilius, Trebatius Testa,[g] Cascellius,[h] Tubero,[i] * Ælius Gallus,[j] and Granius Flaccus.[k]

(*a*) Leibnitz bestows upon these jurists this praise: "Dixi sæpius post scripta geometrarum nihil extare quod vi ac subtilitate cum Romanorum jureconsultorum scriptis comparari possit; tantum nervi inest, tantum profunditatis." Opp. Vol. IV. P. 3. page 267; and again: "Ego Digestorum opus, vel potius auctorum unde excerpta sunt labores, admiror; nec quidquam vidi, sive rationum acumen sive dicendi nervos spectes, quod magis accedat ad mathematicorum laudem." Epist. Vol. 1. p. 119. See also: *Federi* Specimina Leibnitiana. Hanover, 1805. p. 145. *Savigny*, R. R. in M. A. Vol. 1. p. 4.

(*b*) See, concerning the Rom. jurists of this period, especially: *Pomponius* in fr. 2. § 41–47. D. 1. 2.—*Gravina*, de ortu et progressu juris civilis. § 46 seqq.—*Hoffmann*, Hist. jur. P. 1. p. 312 seqq.—*Hugo*, R. G. p. 817 seqq.—*Neuber*, Die juristischen Classiker. Vol. 1, Berlin, 1806.—*Zimmern*, R. G. Vol. 1. § 53–103.—*De Weyhe*, libri tres edicti. p. 8 seqq. The most minute account has been furnished by *Zimmern*; l. c., and the most valuable is that of *Puchta*, in Inst. p. 417 seqq. See likewise *Walter*, G. R. R. p. 443 seqq. *Danz*, R. R. G. p. 77, 95, 96. *Burchardi*, Gesch. u. Inst. p. 261 seqq.—These jurists are called, in the fragments of the classical jurists as well as in the imperial constitutions previous to Constantine, "veteres" (sometimes "antiqui").

(*c*) *Pomponius*, in fr. 2. § 41, says of him: "jus civile primus constituit;" and Cicero, de orat. I. 39, calls him: hominem omnium et disciplina juris civilis eruditissimum et ingenio prudentiaque acutissimum—jurisperitorum eloquentissimum.—*Cicero*, Brut. c. 39. 40.—*J. C. van Randwyck*, Spec. continens vitas Ictor. Romanor. Q. M. Scævolæ et Pub. Rutilii Rufi. Groningen, 1826.

(*d*) Cicero was not, properly speaking, a jurist, but a statesman: he united however to his oratorical talents and philosophical erudition considerable legal knowledge; and his writings, especially his forensic speeches, are of great importance in the study of the laws of the republic, and have for this reason often been made the subject of illustrations. A full account of the writings on Cicero, is contained in *Haubold*, Inst. jur. dogm. Edited by Otto (1826). p. 146, note *c.*, to which the following may be added: *Massé* de Ciceronis orat. in Verrem. Leyden, 1824.—*Klerck* de Ciceronis orat. pro Cœlio. ibid. 1825.—*Rovers*, Diss. in Ciceronis orationem pro Roscio Comœdo. Utrecht, 1826.—*Elouï* ad Ciceronis orat. pro Balbo. Leyden, 1828.—*Gratama* de Ciceronis philosophia de jure civitatis et imperii principiis. Groningen, 1827. *Ed. Platnerus* de iis partibus librorum Ciceronis rhetoricorum, quæ ad jus spectant. Marburg, 1829. 2d Edition, 1831.—See *Keller*, Orat. Vol. 1. 1841.

(*e*) *Cicero*, Brut. c. 41.—fr. 2. § 44. D. 1. 2.—*E. Otto* de vita et scriptis Servii Sulpicii; in his Thes. Vol. 5. p. 1549.—*Schneider*, Quæstiones de Servio Sulpicio Rufo. Leipsic, 1834.

(*f*) *E. Ottonis* Alfenus Varus; in his Thes. Vol. 5. p. 1633.

(*g*) *Gundling's* C. Trebatius Testa; with a preface, containing an account of the most illustrious Roman jurists, by Jenichen. Leipsic, 1736.

(*h*) *Lageman's* Diss. de A. Cascellio Icto. Leyden, 1823.

(*i*) *P. H. S. Vader* de Q. Ælio Tuberone Icto, ejusque quæ in Digestis extant Fragmentis. Leyden, 1824.

(*j*) *C. Ælii Galli* fragmenta de verborum significatione. Edited with notes by Heimbach. Leipsic, 1823.

(*k*) The jurists distinguished in this and other sections by asterisks are quoted in the

Schools of Roman Jurists since Augustus.

§ 46. After the time of Augustus, the Roman jurists specially authorized to respond on the jus (§ 43) seem to have divided themselves into certain schools or legal sects. Pomponius at least, in his legal history from that period to the time of Hadrian, with whom it closes, constantly preserves the distinction between two classes of jurists who frequently differed from each other in their principles and views.[a] These schools, however, appear to have been nothing but separate academies or offices (*stationes*), for giving responsa, or opinions.[b] The professors and chiefs of these differed in their elementary views, and were followed therein by their scholars for several generations. From this disunion originated, of course, many controversies, which were debated with great warmth. These controversies were subsequently settled by imperial constitutions or by judicial decisions. The founders and most eminent adherents of these chief sects were the following:

*Antistius Labeo. (c)	Ateius Capito.
Nerva (grandfather of the emperor of that name).	Massurius Sabinus (from him the name Sabiniani).
*Proculus (from whom the followers of this sect were called Proculeiani).	Caius Cassius Longinus (from him the name Cassiani).
Pegasus.	Cœlius Sabinus.
*Juventius Celsus.	*Javolenus Priscus.
*Neratius Priscus.	*Aburnus Valens. (d)
	*Salvius Julianus (§ 42). (e)

Celebrated Jurists after Hadrian.

§ 47. After Hadrian, the distinction of the schools is no longer to be traced with any degree of exactness. Many civilians have supposed that the age of the eclectics (or, as they were called, *herciscundi* and *miscelliones*) begins at this time: but this opinion is without any foundation[f]; for it is certain that there were followers of the old schools

Pandects.—See Index Ictorum Florentinus, which is to be found in the Gottingen as well as Beck's Edition of the Corpus Juris.—See *Hoffmann*, l. c. p. 314.—*Spangenberg*, Einl. p. 24.—*Dirksen*, Civ. Abh. Vol. 1. p. 210.—*Puchta* in Rhein. Mus. Vol. 3. p. 365.—A complete list of the jurists quoted from has been furnished by *Wieling* in his Jurisprudentia restituta. P. 1. p. 72; and another (though a very incomplete one) of the commentators upon single fragments of these jurists, is found in *Sammet*, Hermeneutik. p. 30–34.

(a) fr. 2. § 47. D. 1. 2. See, respecting these schools of the Roman jurists: *Gravina* de ortu et progressu jur. civ. § 45.—*Hoffmann*, Hist. jur. P. 1. p. 312.—*Mascovius* de Sectis Sabinianorum et Proculeianorum. Leipsic, 1728. *Eckhard*, Hermeneut. jur. § 152 seqq and *Walch*, notes on the same.—*Hugo*, R. G. p. 832.—*Zachariä*, R. G. p. 223.—*Spangenberg*, Einl. p. 228.—*Schrader* on Gaius's Institutes (cited § 43. note e.).—*Dirksen*, Beitr. No. 1.—*Zimmern*, R. G. Vol. 1. § 64–67.

(b) See *Gellius*, Noct. Attic. XIII. 13.

(c) *Biener*, A. Labeo juris civilis novator; in his works. Leipsic, 1830. Vol. 1. No. 9.

(d) *Smeding* de Salvio Aburno Valente ejusque quæ in Digestis extant Fragmentis. Leyden, 1824.

(e) *Zimmern*, R. G. Vol. 1. § 91 in fine.

(f) *Festus* sub voce: Miscelliones.—*Brunquell* de jureconsultis herciscundis. — The name *herciscundi* originated through a mistake of Cujas. See *Spangenberg*, Einl. p. 230.

among the jurists subsequent to the time of Hadrian,[a] and that such eclectics had existed during the earlier times of the schools.

The most distinguished jurists after the time of Hadrian are: *Taruntenus Paternus, *Mauricianus, *Papirius Justus,[b] *Terentius Clemens, *Volusius Mæcianus,[c] *Æmilius Macer, *Callistratus, *Tryphoninus, *Ulpius Marcellus, *Sextus Cæcilius Africanus, *Ælius Marcianus, *Pomponius,[d] *Cervidius Scævola;[e] and most particularly *Gaius, *Æmilius Papinianus,[f] *Domitius Ulpianus, *Julius Paulus,[g] and *Modestinus.[h] Jurists of less celebrity, though their writings have been compiled from, are: *Tertullianus, *Rutilius Maximus, *Licinius Rufinus, *two or three of the name Saturninus, *Arrius Menander, *Furius Anthianus, and *Florentinus.

The works of Gaius and Ulpian deserve to be dwelt upon more at large.

1. Of the numerous other writings of Gaius, besides his Institutes, only the fragments contained in the Pandects have reached us. His book entitled *Res quotidianæ sive Aureæ*, which was also used in compiling the

(*a*) *Gaius*, I. 196. II. 15. 37. 217. III. 87. 98 and in different other passages, calls himself still a follower of the school of Sabinus and Cassius, and speaks of them as "nostri præceptores." Proculus and his scholars are called by him "diversæ scholæ auctores." See also fr. 32. D. 39. 2.—fr. 138. pr. D. 45. 1.—§ 2. J. 3. 23 (24).

(*b*) *Papers* de Papirio Justo. Leyden, 1824.

(*c*) A small work of his on the division of the *as*, has been preserved and was first edited by *Sichard* in his edition of the Breviarium Alaricianum. Basle, 1528; afterwards in Grævii Thes. Vol. II. p. 1705; and at last under the title: *L. Volusii Mæciani assis distributio, et Balbi mensoris de asse libellus.* Ed. by Böcking. Bonn, 1831. 12mo.

(*d*) He published an Enchiridion juris, from which an extensive fragment on the sources of the law, the magistratus, and the jurists down to Hadrian (§ 46), has been embodied in the Pandects (fr. 2. D. 1. 2.).—*Sexti Pomponii* fragmentum de origine juris et omnium magistratuum et successione prudentum. Edited by Haubold. Leipsic, 1792.—*Uhle*, Opuscula ad historiam juris et maxime ad Pomponii Enchiridion pertinentia. Halle, 1785. Besides this, a small fragment from his Liber Singularis Regularum, on the indivisibility of servitudes, has been preserved. See: *Cramer* in Hugo's Civ. Mag. Vol. 6. p. 1.—*Barkow*, in the Tüb. krit. Z. Vol. 4. p. 190.—*Schunck's* Jahrb. Vol. 7. p. 127.—Fragmentum S. Pomponii. Edited by Böcking. Bonn, 1831.

(*e*) *Conradi* de vita et scriptis Q. Cervidii Scævolæ. Leipsic, 1755.

(*f*) Of his writings (see *Back*, l. c. § 19.) nothing else has been preserved except the fragments contained in the Pandects, in the Fragmenta Vaticana, and in the Collatio leg. Mosaicarum et Romanarum (§ 57), and a short passage de pactis inter virum et uxorem at the end of the Brev. Alaricianum.—This is to be found also in *Schulting* p. 810, in the Jus civ. Antej. Berlin edition. Vol. 1. p. 245. and in *Böcking's* Caii Institutionum libri duo et fragmentum Papiniani ex lege Romana Visigothorum. Bonn, 1831.

(*g*) *Bach*, l. c § 30–35.—*Haubold*, l. c. p. 276.—*Zimmern*, R. G. Vol. 1. § 100 seqq. His principal work was the Sententiæ receptæ, from which much was selected for the Pandects. We do not possess the original of this work, but have only the Visigothic extracts in the Breviarium Alaricianum (*Schröter*, Obs. jur. civ. Jena, 1826. Obs. 3.). It is to be found in *Schulting*, p. 187; it has been separately published by Hugo, under the title "Julii Pauli sententiarum receptarum ad filium libri quinque ex Breviario Alariciano. Berlin, 1795, and is contained also in the Berlin edition of the Jus civile Antej. The latest critical edition was published by Arndt. Bonn, 1833. (Reviewed by Hugo in the Gött. gel. Anz. 1833. No. 131. Neues allg. Repertor. der Lit. Vol. 3. p. 174.) Some writers ascribe to Paulus also the Fragmentum Veteris Icti de jure fisci (§ 48. note *b*).

(*h*) *Bach*, l. c. § 41.—*Haubold*, l. c. § 285.—*Zimmern*, R. G. Vol. 1. § 102. A fragment of his Regularum liber III. tit. de bonis libertorum is to be found in *Schulting*, p. 801; in the Berlin edition of the Jus civile Antej. Vol. 1. p. 245; and has been separately published by *Böcking*. Bonn, 1831.—His most important work, however, treated de excusationibus tutorum et curatorum, in the Greek language; from which much was extracted for the Pandects. *Augustinus* ad Modestinum de excusationibus liber singularis. Lyons, 1574. And in *Otto*, Thes. Vol. 4. p. 1559.—*Kriegel's* Fragmenta Modestini de excusationibus. Leips., 1830. Gött. gel. Anz. 1832. No. 8. *Guyet* in Heidelb. Jahrb. 1832. No. 5. p. 434.)

Institutes of Justinian, seems to have been a work of uncommon merit. It was probably a rewritten edition of his Institutes, improved by corrections, and treating more at length many matters contained therein.[a]

His Institutes, however, are his most important work to us; and chiefly, because they formed the foundation for the Institutes of Justinian. They were for a long time known only in the altered form in which they were embodied in the *Breviarium Alaricianum* (§59).[b] In the year 1816, the genuine Institutes of Gaius were discovered by Niebuhr in a codex rescriptus of the library of the cathedral chapter at Verona. This *Codex Veronensis* was first published in 1820, at Berlin, from a copy made by Göschen, Bekker, and Bettmann-Hollweg, under the title *Gaii Institutionum Commentarii IV. e codice rescripto bibliothecæ capitularis Veronensis auspiciis regiæ scientiarum Academiæ Borussicæ nunc primum editi.* Göschen in his preface gives a minute history of this discovery with references to the writings on the subject, and also explains the critical method pursued in editing the Institutes. The text of this edition, which is still defective in many places that were illegible in the codex, has been furnished with parallel passages and critical notes by several jurists, especially Hugo, Savigny, Haubold, Cramer, Göschen, Hollweg, and Biener. Appended to it is the *Fragmentum veteris Icti de jure fisci*, discovered at the same time at Verona. The new edition of 1824, by Göschen, was much enlarged and improved from the results of a new comparison of the Codex Veronensis, made by Blume. A third edition has been published since Göschen's death, by Bachmann.[c]

(*a*) See Procem. J. § 6.—*Göschen*, in the Z. f. gesch. R. W. Vol. 1. p. 54.—*Buchholtz*, in Hugo's Civ. M. Vol. 6. p. 228. and *Hugo* himself, ibid. p. 262.—About the different writings of Gaius see *Bach*, Hist. jur. III. 2. § 14. 15.—*Zimmern*, R. G. Vol. 1. § 93.

(*b*) In this shape they are to be found in *Schulting*, Jurispr. Antej. P. 1. and in the Jus Civile Ante-Justinianeum edited by Hugo. Berlin, 1815–17. Vol. 1. p. 187.

(*c*) *Puchta*, Inst. p. 480.—*Böcking*, Inst. p. 38.—The mere text of Gaius is contained in the Ecloga juris civilis. Paris, 1822; likewise in Hartmann's edition of Gaius. Lcipsic, 1825. Critical notes are given in Heffter's edition. Bonn, 1830. A comparison of the Institutes of Gaius and Justinian, with notes, was published by Klenze and Böcking in 1829, 1837, at Berlin, under the title Gaii et Justiniani Institutiones juris Romani. (Reviewed by Unterholzner and Schrader in the Tüb. krit. Z. Vol. 6. p. 29. 42; and by Hugo in *Gött. gel. Anz.* 1829. No. 94.) The following translations have been published: Die Institutionen-Commentare des Gaius, with notes, by *Von Brockdorff*. Vol. 1. Sleswick, 1824. Institutes de Gaius traduites par *Boulet* avec des notes. Paris, 1827. 1828.—The following list contains the principal writings published on the subject: *Dittmar* de nomine, ætate, studiis, ac scriptis Gaii Icti Romani spec. I. Leipsic. 1820. *Haubold*, Oratio: quantum fructum ceperit jurisprudentia Romana et universa antiquitatis cognitio e recens inventis Gaii institutionibus genuinis (1820); in his Opuscula, edited by Wenck. p. 665.—*Schrader*, l. c. (§ 43. note *e*). *Puchta*, Civil. Abh. No. 4.—*Kopp*, Ueber das Alter der Veronesischen Handschrift des Gajus; in Z. f. Gesch. R. W. Vol. 4. No. 7.—*Gans*, Scholien zum Gajus. Berlin, 1821.—*Brinkmann*, Notæ subitaneæ ad Gaii institutionum commentarios. Sleswick and Leipsic, 1821.—*Van Swinderen*, Collatio institutionum Justiniani cum institutionibus Gaii Veronæ inventis, inde ab initio usque ad locum de tutelis: in Annal. Acad. Groningen, 1821. *Dupont*, Disquisitiones in commentarium IV. institutionum Gaii recenter repertarum. Leyden, 1822.—*Unterholzner*, Conjecturæ de supplendis lacunis quæ in Gaii institutionum commentario IV. occurrunt. Breslau, 1823. (Reviewed by Dupont in the Thémis, Vol. 6.

2. Most of the writings of Ulpian have been quoted in the Pandects to a great extent; other parts of them are to be found in the *Fragmenta Vaticana* (§ 57). Besides this, a small work of his has been preserved, like Gaius's Institutes, by means of a single manuscript; which is now to be found in the Vatican Library at Rome. In this manuscript it is called *Tituli ex corpore Ulpiani*; but it is now usually designated as *Ulpiani Fragmenta*.[a]

Legal Writings.

§ 48. From the large number of jurists whose names have been mentioned, as well as from the remarks that have been occasionally made concerning their literary performances, it may be inferred how productive in legal writings this period must have been.[b] They may be reduced to the following classes: 1. Commentaries on the law sources; as for example, on the Twelve Tables, the Edict, single decrees of the people, and ordinances of the emperors. 2. Systems, which

p. 96.—*Dirksen*, Beitr. and in his Versuche zur Critik und Auslegung der Quellen des Röm. Rechts (Leipsic, 1823). p. 104.—*Elvers*, Promptuarium Gaianum. Gottingen, 1824.—*Van Loon*, Collatio institutionum Justinianearum cum Gaii institutionibus Veronæ inventis. Groningen, 1823.—*Van Assen*, Adnotatio ad inst. Gaii commentarios. Leyden, 1826. Comp. *Den Tex* en *Van Hall*, Bydragen tot Regtsgeleerdheid. P. 1. Amsterdam, 1826. p. 468–481.)—*Huschke*, Stud. p. 168–337.—Gajus und seine Bearbeiter; in the Jen. Lit. Zeit. 1825. No. 147–151.—*Schröter* in the Hermes. Vol. 25. P. 2. p. 289 seqq.—*Schrader* in Tüb. Krit. Z. Vol. 1. P. 1. p. 138. 145.

(*a*) Concerning this manuscript see *Savigny* and *Hugo* in Hugo's Civ. Mag. Vol. 4. No. 13.—*Göschen* in the Z. f. Gesch. R. W. Vol. 4. No 3. and *Hugo* in the Gött. gel. Anz. 1819, p. 198. It was first edited by Dutillet (Tilius) assisted by Cujas, with the title: Tituli XXIX ex corpore Ulpiani. Paris, 1549. An account of the later editions is contained in Hugo's Ind. font. appended to his Pauli Sent. rec. Berlin, 1795.—*Haubold*, Inst. lit. Vol. 1. p. 275.—Also in *Schulting*, p. 537. More recently Hugo has produced several valuable editions of the fragments of Ulpian. The 5th edition appeared in 1834. Another remarkable edition is that of Bluntschli. Bonn, 1831, and again 1836.— Among the works on the subject may be noticed: *Schilling*, Diss. critica de Ulpiani fragmentis. Breslau, 1824. (Reviewed by Hugo in Gött. gel. Anz. 1824, No. 69.)—*Schilling*, Animadv. crit. ad Ulpiani fragmenta. Spec. II. Leipsic, 1830. (Reviewed by Hugo in the Gött. gel. Anz., 1830. No. 169.) Spec. III. Leipsic, 1831.—*Heimbach* (on the fragments of Ulpian, Leipsic, 1834) asserts that the fragments are a mere compilation from different juridical works.—Several fragments of Ulpian's Institutes have lately been discovered at Vienna.—*Endlicher* de Ulpiani institutionum fragmento nuper reperto. Vienna, 1836. *Savigny*, Z. f. Gesch. R. W. Vol. 9. p. 1–6., and p. 157 seqq.—*Lachmann*, ibid. p. 174 seqq. p. 231.

(*b*) Besides the two genuine works of Gaius and Ulpian and the writings preserved in the Breviarium Alaricianum, the Fragments Vaticana, the Collatio legum Mosaicarum et Romanarum, and the Pandects, there are some other fragments of legal writings of this period, the authors of which are not known with certainty. 1. The fragment preserved (if not written) by the grammarian Dositheus, who lived in the commencement of the third century, which is entitled: Fragmentum regularum veteris Icti de juris speciebus et manumissionibus. It is contained in Schulting, p. 803. and in the Berlin Edition of the Jus civile Antejust. Vol. 1. p. 251.—See *Haubold*, l. c. p. 272. *Hugo*, R. G. p. 902. *Zimmern*, R. G. Vol. 1. § 7. especially *Schilling's* diss. crit. de fragm. juris Romani Dositheano denuo græce et latine edito. Part 1. Leipsic, 1819. The latest edition of this fragment is that of Böcking. Bonn, 1832, in the Corpus juris Antejust. of Bonn, p. 201 seqq.—(Lachmann) Versuch über Dositheus. Berlin, 1837. 2. The other fragment preserved is the Fragmentum veteris Icti de jure fisci, which has been mentioned in the foregoing section. It was discovered simultaneously with the Institutes of Gaius at Verona, and published together with them. See Z. f. Gesch. R. W. Vol. 3. p. 150.—*Zimmern*, R. G. Vol. 1. p. 26.—A new critical edition has been published by Böcking. Bonn, 1831, 1836. See *Dirksen*, Verm. Schr., Berlin, 1841. No. 2. See also *Spangenberg*, Einl. p. 15.

were either abridgments under the titles of *Institutiones*, *Regulæ*, and *Definitiones;* or larger and more copious works, such as *Libri juris Civilis*, and in later times *Digesta*. 3. Commentaries on systems, or other writings of the older jurists; as the *Libri ad Sabinum*, *ad Cassium*, *ad Papinianum*. 4. Extracts from larger works, for instance, *Javolenus ex Cassio;* and annotations on them, as *Ulpiani et Pauli notæ ad Papinianum*. 5. Monographies, or treatises on single subjects (*libri singulares*); as for example, *de fideicommissis*. 6. Casuistical writings; e. g. *Responsa*, *Epistolæ*, *casus enucleati*. 7. Controversies; e. g. *Quæstiones*, *Disputationes;* and finally, 8. Miscellaneous writings; e. g. *Libri variarum lectionum*, *membranarum*, *differentiarum*, &c.

FOURTH PERIOD.

FROM ALEXANDER SEVERUS TO JUSTINIAN.*

(A. D. 250–550)

Downfall of the Roman Empire.

§ 49. After the death of Alexander Severus (A. D. 235), the Roman empire, once so prosperous but now subverted, hastened rapidly to complete its fall. The prætorians now had the election and dethrone-

* During this period, the constitutions, and especially the writings of the classical jurists, formed in practice the only sources of the law. Both of them presented great difficulties to the spiritless lawyers of the time. To obviate these difficulties in the use of the legal writings, the citation law was enacted, and to facilitate reference to the constitutions, three collections of them were made: the Hermogenian, the Gregorian, and the Theodosian. These works were, however, but of transitory value; and soon after new collections were undertaken in the West, and also in the East. Thus, after the fall of the western Roman empire, the Roman law then in force was compiled from the constitutions and juridical writings, and formed into a body, by Theodoric, king of the Ostrogoths, under the name of Edictum Theodorici (A. D. 500); and again by Alaric II., king of the Visigoths (A. D. 506), under the name of Breviarium, or more correctly, Lex Romana Visigothorum. This was soon succeeded by the Lex Romana Burgundionum, or the so-called *Papianus*. Although these later collections might have been sufficient to relieve the necessities of the times, yet it cannot be supposed that such immethodical and inaccurate works could contribute any thing for the advancement of science, or the perfecting of the law. But the downfall of the western empire was not the principal cause of the decline of Roman law; for it was owing much more to that general decay of science which forms the special characteristic of this period, and to the prevalence of oriental manners and opinions consequent upon the removal of the imperial residence to Constantinople. The former simplicity of the law was supplanted by a tedious oriental prolixity, which was adopted to an extravagant degree by the imperial legislators, in order to magnify and parade themselves in all the pomp of high-sounding bombast. The legislative power was exclusively in the hands of the despotic emperors; the senate, having no longer any share in legislation or government, had consequently lost all its political importance, and was now nothing more than a court of justice. Of the old offices, it is true, that the consulate was retained, until the time of Justinian; but the consuls enjoyed merely an honorary title, though their names were still used as the legal date of the year. In order to neutralize the influence of the præfecti prætorio, these latter were for a long time deprived of the military command, which was not again united to their civil authority until the time of Justinian. Among the most important

ment of the emperors, and the constitution was soon transformed into a complete military despotism; the confusion reached its greatest height when, under Valerian (A. D. 250—260), the German tribes, the Allemanni, the Franks, the Goths, and the Herules, invaded the Roman provinces. Diocletian (A. D. 284) indeed seems to have somewhat revived the decaying strength of the empire; but it was also under his government that its divisions commenced. Constantine (A. D. 306—337) founded on the shores of the Euxine a new seat of empire, where he then took up his abode. From his time the Christian religion became predominant, and the Latin language was gradually displaced

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state officers of the period were the *comes sacrarum largitionum* (master of the treasury), and the *quæstor sacri palatii*, whose duty it was to draw up and countersign the imperial decrees.

Justinian, who found the science of law in this low condition, and the administration of justice embarrassed and defective, readily perceived that no other than radical measures could remedy the disorder; for, his predecessors had not only completely failed in this object, but, in consequence of the improper methods they adopted, had in some respects aggravated the evil. When he had caused a new collection of constitutions to be made (afterwards called Codex *vetus*), he proceeded to the preparation of a greater work; in executing which he erected the noblest monument to legal wisdom that the world has ever produced—one that will survive when empires and nations now existing have crumbled to decay. It was certainly no slight service that Justinian rendered to mankind, when he rescued from the destructive propensities of barbarism this treasure of antiquity, which was fitted and destined to furnish the fundamental principles of the legal systems of all civilized nations; and when he preserved for us, at least to some extent, those products of Roman wisdom which a longer continuance of the notorious citation-law would doubtless have doomed to utter extinction. The haste with which the work was completed, explains the reason why the existing legal literature was not used more extensively and with equal care throughout. Its arrangement, far inferior to that of the Institutes, certainly leaves much to be desired. In carrying out the design of the Pandects, which was to furnish a law work containing all that was necessary for practice, the committee seem to have been so far misled as to prefer the method of the old law books to which the practitioners had been accustomed, and thus to have followed the order originally observed in the Twelve Tables, and afterwards copied from them into the Edict. In its principal features, the order of the Pandects is as follows:

Books 1 — 19, after a very short introduction, treat of proceedings at law, and of actions in rem and in personam.
" 20, of the rights of pawn and mortgage.
" 21 & 22, of rights of obligation, again of proceedings, and of some general matters.
" 23 — 27, of family rights (rights of marriage and guardianship).
" 28 — 39, of the law of inheritance.
" 40 — 43, of the rights of things.
" 44 — 46, again of rights of obligation.
" 47 & 48, of criminal law.
" 49 & 50, contain appendices concerning the government, the military, corporations, &c.

The two last titles (16 and 17) of the 50th book, treat de verborum significatione and de regulis juris.

This arrangement is evidently not a little unsystematic; and what makes it still worse, is, that very often the subjects are not disposed under those heads to which they belong. Subjects that appertain to one topic are frequently treated of at large under

by the Greek. Such important changes could not take place without great influence upon the Roman law.[a] The empire was divided anew under the sons of Constantine, and again (A. D. 395) under the sons of Theodosius, of whom Arcadius obtained the East, and Honorius the West. Indeed this was the last great division of the empire, though its extent was continually diminished, as the loss of one province was followed by that of another through the increasing violence of the barbarian invasions, against which the weak emperors of the West could not protect themselves. In the commencement of the fifth century, Alaric, king of the Visigoths, made an attack upon Italy, and plundered Rome: the Alani, Vandals, and Suevi advanced through Gaul to the Pyrenean peninsula, and thence to Africa; the Franks, Burgundians, and Ostrogoths took possession of Gaul, Helvetia, and the

(a) The works on the influence of Christianity upon the Roman law, are mentioned in *Haubold*, Institutiones juris historico-dogmatici, § 138. 139.—See also *Meysenbug* de Christianæ religionis vi et effectu in jus civile. Gottingen, 1828.

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another, as opportunity serves: thus, for instance, in the first twenty books, many matters are discussed which should have been reserved for the departments of obligation, family rights, or rights of things; so that the preceding survey of the contents of the Pandects can only serve to give a general idea of their arrangement. In our times, however, the great inconveniences occasioned by this confused method are completely obviated by the systems which modern civilians have introduced for the study and practice of the Roman law; and it is now very easy to find the provisions relating to any matter treated of in the Pandects, or in any other part of the Corpus Juris. As the essence of the whole Roman private law is contained in the Pandects, it is customary in Germany to denote the whole Roman private law by the term Pandects.

Nearly at the same time with the Pandects, Justinian's Institutes received legal authority as a text-book designed for the use of students. This work is nothing more than a republication of the Institutes of Gaius adapted to the law of the time. The Institutes treat almost exclusively of private rights. Although their arrangement is not calculated to satisfy our present demands with regard to system, it is far superior to that of the Pandects. The system is briefly this: the *first* book treats of persons; the *second* book and the first thirteen titles of the third book, of real rights and the law of inheritance; from title fourteenth of the *third*, to title sixth of the *fourth* book, of the rights of obligation; titles sixth to eighteenth, of the fourth book, discuss the doctrine of actions and exceptions; and the eighteenth, or last title, is devoted to a very brief survey of crimes and their punishments.

The new Code (consisting of twelve books) follows in some measure the system of the Pandects, but many titles of the latter are omitted altogether; and on the other hand, new titles are added, as for instance, on matters relating to ecclesiastical and public law. The fact that this Code appeared so soon after the publication of the so-called old code, has led many civilians to suppose that it was undertaken merely at the suggestion of Tribonian, who might have been anxious that his name should figure as president over the composition of this collection, as it did over that of the Pandects and Institutes. But the probability is, that in composing the Pandects and Institutes, the committee came to the conclusion that it was necessary to introduce certain alterations into the code then existing, and to enlarge it by the insertion of the fifty decisions of Justinian.

While the Code was written in the Latin language throughout, the Novels (the Constitutions of Justinian, issued after the publication of the Code) were all originally composed in Greek, with the exception of those destined for provinces where the Latin language was spoken. The editions of the Corpus Juris, however, contain only a Latin translation of them.

country bordering on the Rhine; while Britain became occupied by the Saxons, and Attila (about A. D. 450) invaded Gaul with his Huns, who every where carried destruction in their path. The court of Constantinople contented itself with looking inactively at these storms in the West; for its weakness and narrow-minded policy prevented it from making any energetic efforts to relieve the western empire, the existence of which was at length completely terminated by Odoacer (A. D. 476). The power of the Romans, once extending over the greater part of the world, was now limited, with a few occasional exceptions,[a] to the empire of the East; which continued to the year 1453, when it was destroyed by the Turks.

The alterations that were made under Constantine in the administration of the state, and indirectly even in its constitution, deserve to be more particularly noticed in this place. The two principal cities had each an administration of its own, unconnected with that of the empire. The former state authorities thereby became municipal magistrates; and here too in consequence of the monarchical system a *præfectus urbi* stood at the head of the community.[b] The empire itself was divided into four *præfecturæ prætoriæ*, in such manner that the *præfectus Orientis* resided at Constantinople, the *præfectus Illyrici* at Thessalonica, the *præfectus Italiæ* at Milan, and the *præfectus Galliæ* at Treves.[c] The civil and military departments were separated, and for the latter *magistri militum* and *duces* were appointed.[d] The central officers of government were the *quæstor palatii*, the *magister officiorum*, and the *comites largitionum*; these also formed, in connexion with others, the state council (*consistorium*).[e] The systems of taxation (*indictiones*) were enlarged.[f] There were however, and still continued to be, many provincial and local governments, with peculiar institutions of their own which did not conform to this general arrangement of the administration of the empire. Attention is therefore to be given to the judicial and administrative authorities appointed for such provinces,[g] and especially to the municipal constitutions,[h] which alone preserved a certain degree of independence of the imperial government.[i] It is also worthy of notice, that the church in its external institutions imitated

(*a*) Justinian, indeed, conquered Italy; but it was lost again and finally, under his immediate successor.

(*b*) M. C. Curtius de senatu Rom. post tempus liber. reipubl. Geneva, 1769.—*Gibbon's* History. chap. 17.

(*c*) *Lydus* de Magistratibus II. 10. 11. III. 41., and especially I. 14.

(*d*) *Gibbon*, chap. 17.

(*e*) The consistorium existed under Augustus, but it obtained its importance and central power under Hadrian. The former office of quæstor candidatus principis was changed into that of quæstor palatii. *Burchardi*, Gesch. u. Inst. § 48.

(*f*) *Gibbon*, chap. 17.—*Schultz*, R. St. W. p. 501 seqq. and especially 605 seqq.

(*g*) Notitia dignitatum, and the notes of Pancirolus thereon, cap. 98.

(*h*) *Savigny*, R. R. im M. A. Vol. 1. c. 2.

(*i*) Hence the special head of civitates vel res publicæ (Dig. 50. 8), and likewise the sanctiones pragmaticæ.—See *Puchta*, Inst. p. 382–401. 408. 591 seqq.

those of the state.[a] Another political change of considerable importance to the history of the private law was, that the natural free development of the law by the courts and jurists became more and more limited in conformity with the spirit of the autocratic government: the autocracy assumed even the interpretation of the law, and all that it permitted was the growth of local law customs.[b]

Alterations of the Roman law.

§ 50. In this period the alterations of the law were almost exclusively effected by imperial ordinances and by customs. With the increasing despotism of the emperor, their ordinances increased in number. These continued to be, as they previously had been (§ 39), various in their contents and intentions.[c] Only a small number of them were laws in the strict meaning of the term, at least in the times of the earlier emperors. A great many did not even relate to the private law, but to the administration of government, especially the finances, the war department, and the provinces; and even those which related to the private law very seldom, before the time of Constantine, contained new enactments, but usually nothing more than the application of the existing law to single cases and persons. Hence they may be reduced to two classes, viz. to *general* and *personal* ordinances.

I. *Constitutiones generales*, that is, general ordinances intended for the whole people; to this class belonged in particular the *edicta*, or *leges edictales*.[d]

II. *Constitutiones personales*, which were intended only to establish provisions for single persons: of this kind were the *privilegia*;[e] and in a certain sense the following may also be considered as belonging to them: 1. The *mandata*, imperial orders and directions for the officers of state; 2. The *decreta*, decisions in judicial cases which had been brought by way of provocatio or appeal before the auditorium principis.[f] 3. The *rescripta*, answers and directions of the emperors

(a) *Gibbon*, chap. 15. No. 5.—*Kist* de commut. quam Constantino M. auctore societas subiit Christ. Utrecht, 1818. — *Suffken* de Theodosii M. in rem Christianam meritis. Leyden, 1828.— *Hug*, Denkschrift zur Ehrenrettung Constantin's d. Gr., in the Freiburger theolog. Zeitung. No. 3.

(b) See const. 1. 12. Cod. I. 14; const. 2. Cod. VIII. 53. The above observations will assist the reader in obtaining a correct view of the first book of the Pandects, and also in understanding how the consuls and prætors came to be in such miserable subserviency to the government.

(c) *Haubold*, Inst. jur. dogm. § 161.—*Löhr*, Uebersicht der Constitutionen. 1st Progr. *Wetzlar*, 1811. 2d Progr. 1812. (Reviewed by Hugo in the Gött. gel. Anz. 1812. p. 541. 1813. p. 1836.)

(d) const. 3. C. 1. 14. See however const. 12. Cod. ibid. and the following note.

(e) fr. 1. § 2. D. 1. 4. "Plane ex his (constitutionibus) quædam sunt *personales*, nec ad exemplum trahuntur." See *Braun's* Erörterungen, p. 45 seq.

(f) On these a work was written by Paulus under the title: Imperialium sententiarum in cognitionibus prolatarum libri VI.

upon applications or questions in doubtful cases, which were given, on the opinion of the auditorium principis, in conformity with the subsisting law.[a] Before Constantine, most of the imperial ordinances were merely decreta and rescripta; but subsequently the edicta became very frequent, and often produced extensive changes in the constitution: for the prevalence of Christianity had changed many of the former opinions of the nation; and the manners and language of the East (where the metropolis was placed) differed widely from those of the West (§ 49 note *a*, p. 39).

Decline of Legal Science.

§ 51. The cultivation of legal science, which had reached its meridian under Hadrian and the Antonines, could no longer prosper amid the internal commotions of the empire, and all its life and vigour soon became extinct. All the sciences decayed, and the old Roman spirit expired beneath the oppression of despotism and the corruption of morals.[b] There were but few if any lawyers of eminence later in this period; and of all those who lived before Justinian, only these deserve to be named: Gregorius, *Hermogenes,[c] *Aurelius Arcadius Charisius, and *Julius Aquila; and these are worthy of notice only because the two first edited two valuable collections of imperial ordinances, and the three latter are quoted in the Pandects (§ 54).[d]

Law Sources at the beginning of the fifth Century.

§ 52. At the commencement of the fifth century, the state of the law sources was as follows. Theoretically the Romans continued to regard as law sources: 1 the ancient decrees of the people; 2. the decrees of the senate; 3. the edicts of the Roman magistrates; 4. the ordinances of the emperors; and, 5. unwritten customs. The law of the Twelve Tables still formed the basis of the whole, and all the laws of later times had the relation to them of additions or modifications. But in practice, only the writings of the classical jurists and the constitutions of the

(*a*) That they were not originally laws, the emperors Theodosius and Valentinian themselves acknowledge, in const. 2. Cod. 1. 14.: "nec generalia jura sint, sed leges faciant his duntaxat negotiis atque personis pro quibus fuerint promulgata." But it was a matter of course that they would be referred to as responsa prudentum and as the prejudicia of the supreme court. Justinian first invested the rescripta with the character and authority of laws. const. 12. C. 1. 14. See also above, p. 29. note *a*.

(*b*) The reader who will only examine the decree of publication of the Theodosian Code, and compare with it Ammianus Marcellinus, lib. 30. c. 4. will have no difficulty in understanding to what a low degree legal science had at that time been reduced.

(*c*) This jurist, distinguished among his contemporaries, made extracts from the older jurists (which afterwards were used for the Pandects) under the title: Juris Epitomarum libri VI.—*Jos. Finestres* et *de Monsalvo* Commentarius in Hermogeniani juris epitom. libr. VI. in 2 Vols. Cervera, 1757.—*Bach*, Hist. Jur. III. 3. § 8.—*Hugo*, R. G. p. 1091.

(*d*) *Haubold*, Inst. jur. dogm. § 195.—*Zimmern*, R. G. Vol. 1. § 104–106.

emperors were used as sources.[a] Indeed, the jurists had done much for the judges in the practical application of the law sources, having through their writings opened an access to all their labyrinths even to the common citizen. Their works obtained therefore a well deserved authority in the courts. But when, owing to the infinite variety of the legal writings,[b] the judges were no longer able to examine the opinions of each of the different jurists from their original arguments, they began to rest satisfied merely with celebrated names or with opinions the arguments for which they happened to know. It became a general custom in the courts to follow blindly the dicta of a great lawyer; and, since even the most sagacious Roman law writers disagreed on many subjects, it may easily be imagined, how vague, uncertain, and arbitrary the administration of justice must have become in the hands of such judges.

§ 53. Such being the state of things, the emperor Constantine seems to have considered it necessary to determine by special ordinances what writings of the old jurists should have particular authority, and what should not be regarded.[c] A century later (A. D. 426) Theodosius II. issued a similar and yet more extensive ordinance, which was intended for the eastern empire; but soon after, it obtained legal force also in the western.[d] This ordinance (which is by mistake commonly attributed to Valentinian III.[e] and hence called Valentinian's law of quotation) provided that all the writings of Papinian, Paulus, Gaius, Ulpian, and Modestinus, after the manuscripts containing them had been collated and their readings settled, should have the force of legal authority. The same authority was extended to all those older jurists whose opinions and treatises were incorporated in and explained by the writings of the five above-named, with the exception only of the notes of Ulpian and

(a) *Savigny*, R. R. im M. A. Vol. 1. p. 7.

(b) Gibbon, in his History Ch. 44. justly remarks: "In the space of ten centuries, the infinite variety of laws and legal opinions had filled many thousand volumes, which no fortune could purchase and no capacity could digest. Books could not easily be found; and the judges, poor in the midst of riches, were reduced to the exercise of their illiterate discretion." See const. 2. § 17. C. 7. 11.

(c) The const. un. pr. C. Theod. 9. 43. (made by Constantine) shows that Constantine prohibited reference to the notes of Ulpian and Paulus on Papinian; and the Consultatio veteris Icti § 7. (Schulting, p. 821) shows that the Sent. rec. of Paulus were regarded as high authority by the imperial constitutions. Further proofs have been afforded of late by two constitutions of Constantine discovered by Clossius in the Ambrosian library at Milan, which also explain the passage "sicut dudum statutum est" in the citation law. See *Clossius*, Theodosiani Codicis genuini fragmenta, &c. Tubingen, 1824. p. 35. (Lib. I. tit. 4. const. 1. 2.) — *Hugo*, R. G. p. 1014.

(d) It is contained in the Cod. Theod. as Const. un. de responsis prudentum (1. 4.).— See concerning it *Haubold*, Exerc. de emendatione jurisprud. ab Imp. Valentiniano III. instituta ad L. un. C. Theod. de responsis prudentum. Leipsic, 1796; and in his Opusc. edited by Wenck and Stieber. Vol. 2d p. 1. (Reviewed by Hugo in the Gött. gel. Anz. 1796. p. 1098.) Copious supplements have been furnished by *Wenck* in his preface to Haubold, p. 3–23.—See also *Hufeland*, Nachricht von den juristischen Schätzen der Würzburger Universitäts-Bibliothek (Report on the legal treasures of the University library of Wurtzburg.) Bamberg, 1805. p. 51.—*Hugo*, R. G. p. 883. 1023.—*Savigny*, R. R. im M. A. Vol. 1. p. 8.—*Witte*, Abh. Berlin, 1817. No. 2.—*Puchta* and *Blume*, in the Rhein. Mus. Vol. 5. No. 6. Vol. 6. No. 2.

(e) See *Hugo*, R. G. p. 1027.

Paulus, on Papinian, which had been previously forbidden by Constantine. In case of the disagreement of these authors, the majority were to decide: where their opinions were equally divided, that of Papinian was to have the preference; but where he was silent, the judge was to follow his own opinion. All these ordinances however could not have been of much use; for, instead of an accurate examination of the varying opinions, which before was at least possible, though seldom effected, the duty of the judge was now in a great measure confined to the mere mechanical computation of votes.[a]

Codex Gregorianus et Hermogenianus.

§ 54. The constitutions presented a similar though not so great a difficulty; for being published singly and without connexion as cases and circumstances occasioned them, and being very numerous, it was not easy to know or even to obtain them all. Collections of them were therefore urgently needed. Two jurists, Gregorius and Hermogenes, about the middle of the fifth century endeavoured to supply this want, by undertaking two collections (*codices*) of imperial constitutions.[b] Both these collections, however, were almost exclusively composed of rescripts.[c] The *Codex Gregorianus* contained the constitutions from Hadrian down to Constantine. The *Codex Hermogenianus* it appears was nothing more than a supplement to the former, containing the constitutions of Diocletian and Maximilian. There are but few fragments left of these two collections.[d]

Codex Theodosianus.

§ 55. The *Codex Theodosianus*[e] was of greater importance than either of the foregoing. Upon an ordinance of the emperor Theodosius

(*a*) For this reason it was repealed by Justinian in the Const. *Deo auctore* de concept. Digestorum.

(*b*) Similar private collections were made at an earlier period. Thus the rescripts of the Divi Fratres (Wieling, Jurispr. rest. p. 157.) were collected by Papirius Justus; the rescripts of Hadrian were compiled by the grammarian Dositheus (Schulting p. 855. and in Dosithei Magistri interpretamentorum liber tertius; edited by Böcking. Bonn, 1832. p. 1.); Ulpian collected in his work De officio proconsulis, all the ordinances issued against Christians (Lactantius div. Inst. 5. 15.); and Paulus made a collection of the imperial decrees of Septimius Severus and Antonius Caracalla, under the title: Imperialium Sententiarum in cognitionibus prolatarum libri VI. (Inscript. fr. 113. D. 35. 1.) See the foregoing section.

(*c*) *Pohl*, Comm. de Codicibus Gregor. et Hermog. Leipsic, 1777.—*Back*, Hist. jur. Lib. 3. § 4.—*Hugo*, R. G. p. 1017.—*Löhr*, Uebersicht der Constitutionen, 2d Progr. p. 9.—*Zimmern*, R. G. Vol. 1. § 46.—*Jacobson*, Diss. critica de Codicibus Gregoriano et Hermogeniano. Konigsberg, 1826.—*Spangenberg*, Einleitung p. 10 seq.

(*d*) They are found in *Schulting*, p. 683. and in the Berlin edition of the Jus civile Antejust. Vol. 1. p. 265.—See *Haubold*, Inst. lit. p. 259.—*Hänel* in the 2d Vol. of the Bonn edition of the Corpus jur. Antejust.

(*e*) Mackeldey considers it more correct to say, Theodosianus codex, likewise Gregorianus et Hermogenianus codex, instead of Codex Theodosianus, &c. See *Hugo*, Civ. Mag. Vol. 6. p. 171. Rosshirt on the other hand refers for the contrary to Schilling in his preface to his History of Roman law. The present Editor, though he approves of the latter opinion which is also supported by general use, cannot but express surprise, to find such trifles made the subject of controversy.

the Younger, a committee of sixteen jurists, of whom the ex-consul and ex-præfectus prætorio Antiochus was the chief, made a collection of the edicts of the emperors, including however many of the rescripts. This collection was published, A. D. 438, as a code for the eastern empire.[a] Theodosius sent this new code to his son-in-law Valentinian III. who confirmed it the same year for the western empire, and presented it to the senate at Rome, where it was received with acclamation.[b] This Codex Theodosianus contains several of the constitutions of the emperors after Constantine, which, when relating to different subjects, were divided and placed under different heads (titles), and in consequence were very often dismembered. It consisted of sixteen books, each of which was subdivided into titles. From the conclusion of the sixth book to the end the work remains entire; and since the late discovery at Turin, the first five books and the commencement of the sixth have been nearly all recovered.[c] For a very good edition of the Codex Theodosianus accompanied by excellent comments, we are indebted to Jacob Gothofredus.[d] It was not however until after his death that this edition was published, by Anthony Marville at Lyons, A. D. 1665, in six volumes folio; this was afterwards revised and published with various readings and many additions, by John Daniel Ritter at Leipsic, A. D. 1736–1745, in six folio volumes, the last of which was divided into two parts. The latest edition of the Codex Theodosianus is to be found in the *Jus civile Ante-Justinianeum*, published at Berlin in 1815. Since that time, several genuine constitutions of the first five books have been published, which were recovered partly by Clossius in the Ambrosian library at Milan and partly by Amadeus Peyron in palimpsests of the library at Turin, and finally through the discovery at Turin above-mentioned.[e]

(*a*) *Bach*, l. c. lib. 3. c. 4. § 2 seqq.—*Löhr*, l. c.—*Hugo*, R. G. p. 1029 seqq.—*Zimmern*, R. G. Vol. 1. § 47.—*De Crassier*, Diss. de confectione Codicis Theodosiani. Liege, 1825.

(*b*) See the remarkable protocol of the senate of Rome, concerning the reception of the Theodosian Codex in the West, A. D. 438, in Clossius, l. c. (§ 53. note *c*).

(*c*) We are indebted for this to Vesme of Turin and Hänel of Leipsic. See *Richter's* krit. Jahrb. 1836. p. 91.

(*d*) Respecting the first edition of the Codex Theodosianus by Tilius and Cujas, see: *Haubold*, Inst. lit. p. 261. *Haubold*, Inst. jur. § 218–220.—*Hugo*, Ind. font. (appended to Pauli Sent. rec.) p. 162 seqq. *Hugo* in Civ. Mag. Vol. 3. p. 234.—Comp. also *Niebuhr* in the Z. f. gesch. R. W. Vol. 3. p. 409.—*Spangenberg's* Cujas. p. 231. 258.—*Schröter* in the Hermes. Vol. 25. p. 336.—*Zimmern*, R. G. Vol. 1. § 15.

(*e*) Those which were discovered by Clossius have been mentioned above, § 53. note *c*. —Amadeus Peyron published the constitutions discovered by him, at Turin, 1824. (Reviewed in the Thémis, Vol. 3. p. 185. 474. Vol. 6. p. 411. 489.)—*Clossius*, l. c. (§ 53. note *c*) pref. p. 7.—*Hugo* in Gött. gel. Anz. 1821, p. 197. 1824. No. 88. 1825. No. 72.—*Wenck* in the Leipz. Lit. Zeit. 1824. Nos. 236–239.—Hall. Allgm. Lit. Zeit. 1824. No. 242.—*Schröter* in the Hermes. Vol. 25. p. 340 seqq. To the new discoveries concerning the Theodosian Code belong likewise: *Haubold*, Prætermissorum imprimis ad Breviarium Alaricianum pertinentium e codicibus a Gustavo Hænelio novissime collatis. Promulsio I. Leipsic, 1822. and in his Opusc. edited by Wenck. Vol. 2. p. 897. A continuation of this, taken from *Hänel's* unedited manuscripts found after his death, is contained in Wenck's preface p. 84 seqq.—The fragments discovered and published by Clossius and Peyron have been properly arranged in: Theodosiani Codicis fragmenta. Edited by D. E. Puggæus. With various readings. Bonn, 1825. A new revision of the first five books of the Theodosian Code, such as they were before the recent

Later Constitutions of Theodosius.

§ 56. After the Codex Theodosianus had been completed, the emperors Theodosius II. and Valentinian III. as well as their successors continued to issue new ordinances, which are thence termed *Novellæ*, that is *Novæ Constitutiones*.[a] These have been embodied in later times in the Codex Theodosianus, under the head of *Novellæ Constitutiones Imperatorum, Justiniano anteriorum, Theodosii, Valentiniani*, &c.[b]

Legal Writings before Justinian.

§ 57. From the time of Alexander Severus to Justinian, as has been already remarked, there were few if any productive law writers of importance. All the literary industry of this period was employed in collecting the imperial constitutions and compiling from the works of the old jurists. Besides the fragments of the Codex Gregorianus and Hermogenianus, and the passages that have been copied into the Pandects from Hermogenes, Aurelius Arcadius Charisius, and Julius Aquila (§ 51), nothing of this period has reached us, except the following legal writings of anonymous authors. 1. The *Fragmenta Vaticana* which have been edited by Angelo Mai, A. D. 1823, from a codex rescriptus in the Vatican library. They contain fragments of law writers of the foregoing period, and also of imperial constitutions, and appear to be the remains of a large collection, which was probably made by anonymous writers, during the time that intervened between the Codex Hermogenianus and the Codex Theodosianus.[c] 2. The *Notitia digni-*

discoveries, with the insertion of the constitutions found by Clossius, Peyron, and others, is contained in *Wenck*, Codicis lib. V. priores. With critical and exegetical notes. Leipsic, 1825. Respecting the writings before mentioned see *Schrader* in the Tüb. krit. Z. Vol. 1. p 145. Vol. 3. p. 324; and concerning Wenck's edition especially *Den Tex* en *Van Hall*, Bydragen tot Regtsgeleerdheid. P. 1. p. 1–39. p. 312–357. The latest edition of Hänel is that of 1837 in the Corpus juris Antejust. published at Bonn. Vol. 2. p. 81. Beck's edition, published before the last of Hänel, is contained in the Berlin edition of the Jus civile Antejust. p. 224–1215.

(*a*) *Hugo*, R. G. p. 1035.—*Haubold*, Inst. lit. p. 265.—*Zimmern*, R. G. Vol. 1. § 47.

(*b*) They are found in Gothofred's edition at the beginning of the first volume; in Ritter's edition in part second of the sixth volume; and most complete in the Berlin edition of the Jus civile Antejust. Vol. 2. p. 1217. They are divided into six books: the first contains 35 novels by Theodosian II.; the second, 74 by Valentinian; the third, 4 novels of Marcian; the fourth, 8 of Majorian; the fifth, 2 novels of Alexander Severus; and the sixth, 3 of Anthenius,—in all 126 novels. The best edition is that of Hänel in the Bonn edition of the Corpus juris Antejust., following immediately after the Codex Theodosianus.

(*c*) Of late the conjecture has been advanced that these fragments were fragments of the Hermogenian Epitome. In this view it will be interesting to compare Vat. Fragm. § 3. 4. with fr. 7. D. 18. 3., and § 13. with fr. 49. D. 19. 1.—The original edition of the fragments is entilted: Juris civilis Antejust. reliquiæ inéditæ, ex cod. rescript. bibliothecæ Vaticanæ. Edited by Angelo Mai. Rome, 1823. A reprint was published under the title: Vaticana juris Romani fragmenta. Superintended by the Editors of the Thémis and principally by Jourdan. Another appeared in Rome and Berlin, 1824. Wenck has furnished supplements and critical notes to this edition in the Leipz. Lit. Zeit. 1824. Nos. 173. 174. and Keller likewise in the Thémis. Vol. 6. p. 521.—Respecting the fragments themselves see *Hugo* in the Gött. gel. Ans. 1823. No. 36. 1824. Nos. 16. 68.—*Schrader* in the Tüb. krit. Z. Vol. 1. No. 1. p. 167–186.—Bydragen tot Regtsgeleerdheid by *Den Tex* en *Van Hall*. 1826. No. 1.—Leipz. Lit. Zeit.

tatum Orientis et Occidentis;[a] this is a kind of state almanac of the middle of the fifth century, containing a survey of all the countries included in the Roman empire, and a list of all the public officers.[b] 3. The *Collatio Mosaicarum et Romanarum legum*, which was probably made under Theodosius II. We find it sometimes mentioned in the middle ages under the title *lex Dei*, or *Pariator legum Mosaicarum et Romanarum*, or simply *lex Romana*. This work, which consisted of sixteen titles, is, properly speaking, nothing but a superficial comparison of the Mosaic and Roman law, intended to show that the latter was wholly derived from the former. In this respect it is of very little value; but it also contains a great number of passages extracted from the writings of the Roman jurists and from the imperial constitutions, and on this account it is certainly of some importance. Before the present century only one genuine manuscript of this work was known; this was found in the Bibliotheca Mandubiorum at Lyons, and was first published by Pithou in 1573:[c] but of late two other manuscripts have been discovered, one by Blume at Vercelli, and the other by Lancizolle at Vienna.[d] 4. The *Consultatio Veteris Icti*. This is a collection of opinions given by an anonymous jurist, probably more recent than the Breviarium Alaricianum. The arguments for the opinions delivered in this work, are generally literal quotations from the writings of the Roman jurists and from the constitutions of the emperors; in this way many passages from them have been preserved. Cujas edited this collection in 1577.[e]

1824. Nos. 173. 174.—*Schröter* in the Hermes Vol. 25. p. 362.—*Zimmern*, R. G. Vol. 1. p. 32.—*Glück*, Comm. Vol. 31. p. 169.—The latest critical editions are: the Fragmenta juris civilis Antejust. Revised and illustrated with a Commentary by Buchholtz. Konigsberg, 1828. (Reviewed by Meyerfeldt in the Tüb. krit. Z. Vol. 5. p. 186. and with additions by Puggé in the Rhein. Mus. Vol. 3. § 421.) The Fragmenta Vaticana, revised by Bethmann-Hollweg. Bonn, 1833. Bonn edition of the Corpus juris Antejust. p. 239–302. (Reviewed by Hugo in the Gött. gel. Anz. No. 9. 1834.)

(*a*) *Bach*, Hist. jur. lib. 3. c. 3. § 3. Concerning the different editions and commentaries upon this work see: *Haubold*, Inst. lit. Vol. 1. p. 279. and especially *Böcking* on the Notitia dignitatum utriusque imperii.—Abhandlung zur Literatur-Geschichte und Kritik. Bonn, 1834. A new edition of the Notitia dignitatum by Böcking appeared under the title: Notitia Dignitatum, &c. Bonn, 1839 and 1840.

(*b*) According to Böcking however it was composed about the commencement of the fifth century (A. D. 400–404).—The reader may be here referred to Lydus's work on the Roman Magistrates, mentioned above at the end of § 19; and to a fragment of an unknown author first published by Huschke, 1829, under the title, Incerti Auctoris Magistratuum P. R. expositiones ineditæ; but this production is supposed to have originated later than the fifth century.

(*c*) *Hugo*, R. G. p. 1093.—*Zimmern*, R. G. Vol. 1. p. 30. The Collatio is to be found in Schulting, p. 719. and in the Berlin edition of the Jus civile Antej. p. 1417.—Respecting the other editions and commentaries see *Haubold*, l. c. p. 281.

(*d*) Under the title: Lex Dei sive Mosaicarum et Romanarum Legum Collatio. Edited and illustrated with notes by Blume. Bonn, 1833. Blume consulted the Vienna manuscript also, and to him we are indebted for the division of the titles into sections.—It is also contained in the Bonn edition of the Corp. jur. Antej. p. 309–386. (Reviewed in Neues Allg. Repert. Lit. Vol. 3. p. 168. and by Deurer in the Heid. Jahrb. 1833. p. 1070.) See also *Blume* in Savigny's Z. Vol. 10. p. 298. and *Lachmann* in the same p. 309.

(*e*) *Hugo*, R. G. p. 1093.—*Zimmern*, R. G. Vol. 1. p. 31. It is to be found in Schulting, p. 811. and in the Berlin edition of the Jus civile Antejust. p. 1475. See also: *Haubold*, l. c. p. 254.—*Puggé* in the Bonn edition of the Corpus jur. Antej. p. 391–408.

Further Vicissitudes of the Roman Law.

I. In the West.

§ 58. All the collections of imperial constitutions made since the time of Constantine were but of temporary value, as they merely supplied the wants of the times in which they appeared. As early as the commencement of the sixth century, new collections were found necessary in the East as well as in the West. After the fall of the Roman empire, several new German states were formed in the West, in which the immigrated Germans and the conquered Romans lived together under the same government. The former had separate laws and customs of their own (national laws), which they preserved in their new settlements; while the subdued Romans living among them continued to use their own, and were judged according to it. This system of personal or national laws which prevailed in the earlier part of the middle ages,[a] soon rendered it necessary for the Germans to commit to writing their primitive national laws (*leges barbarorum*), and for the Romans to do so likewise with their law then in force (*leges Romanæ*).[b] Thus originated at this time, in the states of the German empire, two different law collections, German and Roman; at present, our attention will be confined to the latter.

Ostrogothic, Visigothic, and Burgundian Leges Romanæ.

§ 59. The most important of those new Roman law collections among the German nations are: A. The *Edict of Theodoric*, king of the Ostrogoths, which he issued at Rome, A. D. 500, intended not only for the conquered Romans, but also for the Ostrogoths. This Edict is derived entirely from the Roman law, and especially from the Codex Theodosianus, the later Novels (§ 56), and *Pauli sententiæ receptæ*; but these sources were used with such freedom, and so arbitrarily, that the character of the Roman law can scarcely be traced in them.[c] B. The *Breviarium Alaricianum* among the Visigoths.[d] Alaric II. king of the Visi-

(*a*) *Montesquieu*, Esprit des lois. Liv. 28. art. 2.—*Savigny*, R. R. im M. A. Vol. 1. p. 90. —*Eichhorn*, R. G. § 29.—See also *Vollgraff*, Systeme der prakt. Politik. Vol. 3. § 13. and *Godet*, Essai sur l'histoire externe du droit dans la Gaule et dans la Belgique. Liege, 1830.

(*b*) *Lex Romana*, according to the usage of language at that time, means Roman law in general, or a Collection of Roman law. *Savigny*, R. R. im M. A. Vol. 1. p. 105–112.

(*c*) See *Gibbon*. chap. 38.—A list of literary works on the Roman law collections among the German tribes, is contained in *Haubold*, Inst. jur. dogm. Edited by Otto. § 302–305.—The Edict of Theodoric was first edited by Pithœus as an appendix to his edition of Cassiodorus (Paris, 1579), and in most of the later editions of these works; likewise in the collections of Lindenbrog, Georgisch, Canciani, and Walter (see below § 89 in notis); and in Rhon, Comm. ad Edictum Theodorici regis Ostrogothorum. Halle, 1816.—See also *Haubold*, Inst. lit. p. 286.—*Savigny*, R. R. im M. A. Vol. 1. p. 12. Vol. 2. p. 164.—*Hugo*, R. G. p. 1039.—*Eichhorn*, R. G. § 11.—*Zimmern*, R. G. Vol. 1. § 112.

(*d*) C. G. *Biener*, Historia legum Visigoth. in regno Hispaniæ veterc. Leipsic, 1783. also in his Opusc. edited by F. A. Biener. Vol. 2. No. 2, and with an interpreta

goths, published, A. D. 506, a code affecting only the Romans living in his empire, which had been collected in compliance with his order, by a committee of sixteen Roman lawyers, from the Codex Gregorianus, Hermogenianus, and Theodosianus, as well as from some of the later Novels (§ 56), and from the writings of Gaius, Paulus, and Papinianus (§ 47). Most of the passages are accompanied by a paraphrase (*interpretatio*) in very bad Latin, but which was then intelligible.[a] This Visigothic collection is now called Breviarium Alaricianum, or Breviarium Aniani, from Anian, the referendary (private secretary) of Alaric, who was ordered to authenticate by his signature the copies of the Breviarium sent to the comites.[b] In the middle ages it is commonly referred to under the titles, *Corpus Theodosianum*, *Lex Theodosiana*, *Liber legum*, or *Lex Romana*. Many passages have been preserved in this collection, which otherwise would have been lost, especially the fragments of the Gregorian and Hermogenian Codes, those of the first five books of the Theodosian Code, and some of the writings of Gaius,[c] Paulus, and Papinianus.[d] C. Between the years 517 and 534, a Lex Romana was also published among the Burgundians, intended for the Roman subjects in the Burgundian empire, and which is known by the name of *Papiani liber responsorum* or *Papiani responsum*;[e] the greater part of this collection is derived immediately from the pure sources of Roman law. The title *Papiani responsum* was occasioned by a mis-

tio, by Arndts and critical notes, in the Berlin edition of the Jus civile Antejust. p. 105–183; and in the Bonn edition of the Corpus jur. Antej. Part II. p. 46–162. And compare with it *Hänel*, Varietas script. ex Paul. p. 163–204. *Savigny*, R. R. im M. A. Vol. 1. p. 257. Vol. 2. p. 96.—*Eichhorn*, l. c. § 43.—*Hugo*, R. G. p. 1040.—*Zimmern*, R. G. Vol. 1. § 114.—*Guizot*, Cours d'histoire moderne. Paris, 1827. Vol. 1. and in the Revue française. 1828. No. VI. p. 202–244.

(*a*) See *J. Gothofredus* in proleg. Cod. Theod. cap 6. Only to Gaius's Institutes such an interpretatio was not added; since they were entirely rewritten.

(*b*) Anian undersigned not only the decree of publication, but the copies themselves, as will be seen from the Commonitorium contained in *Savigny*, R. R. im M. A. Vol. 2. p. 37. and in *Pernice's* Chrestomathie. No. 143.

(*c*) Among the many extant manuscripts of the Breviarium, the codex formerly at Wurzburg, now in the library at Munich, is the oldest; but it is very defective. It is of the sixth century.—An account of it is given in *Hufeland's* Nachricht, &c. (§ 53. note *d*.) And in *Hugo*, R. G. p. 1046. Another very old manuscript (of the seventh century), formerly belonging to Meermann, and now in the possession of Philipps of Middlehill, Bart., is reviewed by *G. Hänel* in the Leipz. Lit. Zeit. 1828. No. 42. See also *Witte* de Guilielmi Malmesburiensis codice legis Romanæ Visigothorum. Breslau, 1831. The only complete edition of the Breviarium is that of Johannes Sichard published at Basle, 1528. fol. Concerning the other manuscripts and editions see *Haubold*, Inst. lit. p. 223.—*Savigny*, R. R. im M. A. Vol. 2. p. 61.—*Kämmerer*, Beitr. Vol. 1. No. 4. and *Spangenberg* in the Z. f. gesch. R. W. Vol. 5. p. 280. Some single passages of the Breviarium that were unknown before, have been discovered by G. Hänel in some codices at Paris and Orleans, and edited by Haubold under the title: *Haubold*, Prætermissorum imprimis ad Breviar. Alar. pertinentium Promulsio I. Leipsic, 1822; in his Opusc. edited by Stieber. Vol. 2. p. 887. and *Stieber*, in his preface. p. 84.

(*d*) It is to be found in *Schulting*, p. 827. And in the Berlin edition of the Jus Civile Antej. Vol. 2. p. 1501. See *Savigny*, R. R. im M. A. Vol. 2. p. 10.—*Haubold*, Inst. lit. p. 287.—*Eichhorn*, R. G. § 44.—*Hugo*, R. G. p. 1049.—*Zimmern*, R. G. § 114.—The best and most complete edition of it is: Lex Romana Burgundionum, with illustrations from the Roman and German law, by Barkow. Greifswalde, 1826; for which also the Fragmenta Vaticana, discovered by Mai, have been used. See *Biener*, in the Tüb. krit. Z. Vol. 4. p. 345. and *Buchholtz*, in the Hall. Allg. Lit. Zeit. 1831. Nos. 44–46.

(*e*) See above, § 47. note *f*.

take of Cujas, the first editor of this collection, which occurred in the following manner. Every complete copy of the Breviarium Alaricianum closes with a short passage from PAPINIANI *liber responsorum*.[a] In the manuscript it was usual to write *Papiānus* for *Papinianus*. Now Cujas happened to find a complete Breviarium, at the close of which followed, without any mark to indicate a new work, the Burgundian Lex Romana. He therefore took this at first for a continuation of the passage from Papinianus, commenced with that very passage the Burgundian Lex Romana, and entitled the latter, in imitation of the manuscript, *Papiani liber responsorum*; being misled into supposing that the work was attributed to an unknown author. In consequence of this mistake, the short genuine passage from Papinian forms in Cujas's first edition (that of 1566) the first title of the Burgundian Lex Romana, while in fact, it is the last passage of the Breviarium. Cujas afterwards discovered his mistake, and corrected it silently; for in his second edition (that of 1586), he brings forward the passage from Papinian by itself, and opens the Burgundian Lex Romana with the title which really is the first of that collection, although in his former edition he had called it the second: nevertheless he retained for the Burgundian Lex Romana the title, *Papiani liber responsorum*.

II. In the East.—Justinian.

§ 60. After the time of Theodosius II. nothing was done in the East to facilitate the administration and study of the law, until *Justinian* became emperor, A. D. 527.[b] During the thirty-eight years of his government, he made legislation and the promotion of the study of law, the principal objects of his attention; and he was fortunate in finding jurists who possessed such knowledge and abilities as were required for realizing his plans.[c] Under his government those new law collections were made,[d] which continue in legal force in many countries, to the present day; their importance, therefore, requires that we should treat of them more at large.[e]

(*a*) See especially *Savigny*, R. R. im M. A. Vol. 2. p. 24.

(*b*) Concerning Justinian's life and character see *Gibbon's* Hist. Chap. 40–47.—*Ludewig*, Vita Justiniani atque Theodorae, nec non Triboniani. Halle, 1731.—And the older authors mentioned in *Haubold*, Inst. jur. dogm. edited by Otto, § 265. especially *Bach*, Hist. jur. IV. 1. 1.—*Clossius* in the Festschriften (academical orations) of the University of Dorpat, of the year 1834.

(*c*) The most distinguished among them are, Tribonian, Theophilus, Dorotheus, Cratinus, Thalelaeus, Stephanus, Anatolius, and Theodorus. See const. *Tanta* de confirmat. Digestor. § 9. and *Bach*, l. c. sect. 3.

(*d*) The history of his collections is related by Justinian himself, in the constitutions by which they were confirmed and published.—Such constitutions are usually cited by their initial words, as for instance in the preceding note the const. *Tanta*. They are placed in front of the collections to which they relate, and are partly brought together in the Cod. 1. 17.

(*e*) As to the origin, the spirit, and character of these collections, see the older works in *Haubold*, l. c. § 266–301., and particularly *Bach*, l. c. Sect. 2. § 3 seqq.—*Spangenberg*, Einl. p. 16 seqq. p. 148 seqq.—*Hufeland*, Geist d. R. R. Vol. 1. Treatise 1. No. 14–17.—*Löhr* in his Mag. Vol. 3. No. 2.—*Dirksen*, Civ Abh. Vol. 1. p. 192.—*Hugo*, R. G. 1050.—*Sa-*

JUSTINIAN'S LAW COLLECTIONS.

1. First Edition of the Code.

§ 61. Justinian was the first after Theodosius who undertook a new collection of the imperial constitutions, which was intended to form a substitute for all previous collections. For this purpose he appointed a committee of ten lawyers with very extensive powers; at their head was the ex-quæstor sacri palatii Johannes, and among them the afterwards well known *Tribonian*.[a] His instructions were, to select in the briefest manner all that was still of value in the existing collections, as well as in the later constitutions; to omit all obsolete matter; to introduce such alterations as were required by the times; and to divide the whole into appropriate titles. Within fourteen months the committee had finished their labours. Justinian confirmed this new Code, which consisted of twelve books, by a special ordinance, and prohibited the use of the older collections of rescripts and edicts.[b] This first Code of Justinian, which is now called *Codex vetus*, has been entirely lost[c].

2. The Pandects.

a. The Commission to Collect them.

§ 62. After the above-mentioned Code was completed, Justinian ordered Tribonian (A. D. 530), who now was invested with the dignity of quæstor sacri palatii, and sixteen other jurists,[d] to select all the most valuable passages from the writings of the old jurists which were regarded as authoritative, and to arrange them according to their subjects under suitable heads. The commissioners for this compilation also enjoyed very extensive powers.[e] In regard to the writings from which they should extract, they were exempted from the Theodosian law of citation (§ 53),[f] and were not confined to the letter of the writings selected; but had the privilege at their discretion to abbreviate, to add, and to make such other alterations as they considered adapted to the times: and they were especially ordered to remove all the contradictions of the old jurists, to avoid all repetitions, and to omit all that had become entirely obsolete.[g] The natural consequence

vigny, R. R. im M. A. Vol. 1. p. 12–15.—An excellent sketch of the origin, design, contents, and method of Justinian's collections is given by *Clossius* in his Hermen. d. R. R. p. 105 seqq.

(*a*) const. *Hæc quæ necessario* de novo Codice faciendo, dated idibus Febr. 528.

(*b*) const. *Summa reipublicæ* de Just. Cod. confirm. dated 7. idibus April. 529.

(*c*) Justinian himself calls it Justinianeus Codex, in the const. *Cordi nobis* de emendat. Cod. § 5.—*Hugo*, R. G. p. 1051.—*Zimmern*, R. G. Vol. 1. § 48.

(*d*) Concerning the Pandects, see *Spangenberg*, Einl. p. 23–57.—The commissioners are named by Justinian himself in the const. *Tanta*, § 9. and const. *Dedit*, § 9.

(*e*) const. *Deo auctore* de conceptione Digestorum, ad Tribonianum, which is usually prefixed to the Pandects or found as const. 1. C. 1. 17.

(*f*) Respecting the influence of the citation law upon the Digests, see *Hugo* in the Civ. Mag. Vol. 6. p. 176. and above, § 53. note *d*.

(*g*) const. *Deo auctore*, § 4–9.—*Hugo*, R. G. p. 1055 seqq.—*Zimmern*, R. G. Vol. 1. § 59. 60.

of this was, that the extracts did not every where truly represent the original, but were often interpolated and amended in conformity with the existing law. Alterations, modifications, and additions of this kind are now usually called *emblemata Triboniani.*[a]

b. Manner of Compiling.

§ 63. This great work was completed by the commissioners in three years.[b] Within this short space of time they had extracted, from the writings of no less than thirty-nine jurists, all that they considered valuable for the purposes of this compilation.[c] We may regard it as a consequence of this haste, that many opinions of the earlier jurists were not derived directly from their own writings, but from the works of others, where they were found quoted. Such being the case, besides that many passages were dismembered and misplaced by the compilers, it is not surprising that this compilation was sometimes defective or erroneous.[d] Over every extract, which regularly consists of a *principium* and one or more paragraphs,[e] a heading (*inscriptio*) was placed, containing the name of the work from which it was or should have been derived.[f] The whole compilation, consisting of fifty books, was entitled *Digesta*[g] *sive Pandectæ*[h] *Juris enucleati ex omni vetere jure collecti.* The work was intended especially for practical use; and this explains the reason why the arrangement of the titles follows, as closely as possible, the order of the Edict; for any one who was familiar with the Edict could find no difficulty in using the Pandects or in referring to

(*a*) *Wissenbach*, Emblemata Triboniani; with a preface by Heineccius, Halle, 1736.—*Meister* de principio cognoscendi emblemata Triboniani. Gottingen, 1745; and in Opusc. No. 4.—*Eckhardt's* Hermen. jur. edited by Walch, lib. 1. c. 6.

(*b*) Justinian himself calls the work an *opus desperatum* (See Procem. Inst. § 2.), and takes much credit to himself for the despatch with which it was completed. const. *Tanta* de confirmat. Dig. § 12. He often mentions also the *immensa veteris prudentiæ volumina.* Nearly two thousand treatises were brought into one compilation of fifty books; and it has been carefully recorded that 3,000,000 of lines were reduced in this collection to 150,000 (that is, to a twentieth part).

(*c*) Though Justinian in const. *Tanta*, § 20, and in const. *Dedit*, § 20, speaks of a list of the jurists and the writings compiled from, which was to be made out and prefixed to the Pandects, it remains doubtful whether this was really carried into effect. The Florentine manuscript of the Pandects indeed contains such a list in the Greek language (Index Florentinus), which is copied into Beck's edition of the Corpus Juris, and likewise into the Gottingen edition; but it is neither genuine nor correct. See *Eckhardt*, Hermen. jur. p. 369.—*Guadagni*, Diss. V. ad Græca Pandectarum. p. 85.

(*d*) *Dirksen*, Civ. Abh. No. 3.

(*e*) The single passages are often called *leges*, although they are nothing more than extracts or fragments from the writings of the jurists. This name certainly applies to them only because through their admission into the Pandects they received the character of laws as far as their contents allowed. But though the term *leges* still continues to be used very frequently, it is more correct to call them *fragmenta.* See *Hugo*, Beitr. zur Bücherkenntniss. 162.—Vol. 2. p. *Buckholtz*, Jur. Abh. p. 371.

(*f*) *Eckhardt*, l. c. p. 359.—*Thibaut*, Log. Ausl. 2d Edition. p. 167.

(*g*) From *digerere* in partes, because Justinian divided the whole collection into seven parts.—*Hugo*, in the Gött. gel. Anz. 1822. No. 56; and in the Civ. Mag. Vol. 6. p. 148.

(*h*) πᾶν and δέχομαι, because all that was valuable was to be comprised in them.—The collection was intended to form a general repertory for the *jus civile*, such as the Codex furnished for the *constitutiones.* *Hugo*, R. G. p. 1078.—*Höpfner*, Comm. Edit. by Weber. Frankf. 1833. § 6.

them.[a] Probably for the same reason, Justinian divided the whole work into seven parts *(partes)*, which very likely resembled the single parts of the Edict.[b] Even with respect to the arrangement of the single fragments of each title, which was for a long time considered to be only arbitrary and accidental, a certain plan appears to have been pursued, as was first noticed very recently (1820) by Blume, the accuracy of whose opinions on this subject has been fully shown by Hugo from various references and quotations. The editors of the Pandects divided into three classes all the books from which extracts were to be made, and formed themselves into three sections: the first section read and extracted from the books on the jus civile, to which belonged the Libri ad Sabinum; the second section extracted from the books on the prætorian edict, especially from Ulpianus ad Edictum; and the third section, from practical and casuistical writings, especially from Papiniani Responsa and Pauli Quæstiones. Three branches of extracts were thus formed, the Sabinus branch, the Edict branch, and the Papinian branch. From these three branches the single titles of the Pandects were composed. The foundation of each title was generally formed by that branch which furnished the most numerous and important fragments. After this, both the smaller branches were collated with it, the repetitions occurring in them were stricken out, the contradictions reconciled, and the necessary additions made; that which remained of the two latter branches, was placed after the first, in such a manner that the greater number of extracts was to decide which of these should be placed in the middle and which at the end of the title. Hence arose the difference in the order of the three branches in the different titles. Every title does not, however, contain fragments from all the three branches, but only the larger titles; and in some of these the three branches even appear twice over. Though the course above described was the regular order of arrangement of the single fragments, there are nevertheless many exceptions.[c]

(*a*) Justinian prescribes in the const. *Deo auctore*, § 5. that the Pandects should be composed *ad Edicti imitationem*. See especially *Benfey* de fundamentis Digestorum ordinis. Gottingen, 1825.—*Tigerström* de ordine et historia Digestorum. Berlin, 1829.

(*b*) const. *Tanta*, § 2–8. The 7 parts are the following:

Pars 1.	(Prota) embraces . .	Book 1–4.
Pars 2.	(de judiciis)	" 5–11.
Pars 3.	(de rebus creditis) . .	" 12–19.
Pars 4.	(Umbilicus)	" 20–27.
Pars 5.	(de testamentis) . . .	" 28–36.
Pars 6.	(no special name) . .	" 37–44.
Pars 7.	(no special name) . .	" 45–50.

The first three books of the fourth part were called more particularly *Antipapinianus*. The 48th and 49th books are called *libri terribiles*, because they contain the criminal law. See on this division especially *Hugo*, Pand. Berlin, 2d Edition, 1828; and on the Antipapinian, *Hugo*, Civ. Mag. Vol. 6. p. 362.

(*c*) *Blume*, on the order of the fragments in the titles of the Pandects, in the Z. f. gesch. R. W. Vol. 4. p. 257.—*Hugo* in the Gött. gel. Anz. 1821. No. 26. Idem, Pand. p. 14. Idem, R. G. p. 1066. Idem, R. G. s. J. 3d Ed. p. 589. Idem in the Thémis, Vol. 1. p. 278.—*Schweppe*, R. R. G. § 121, 122.—*Reimarus*, Bemerkungen und Hypothesen über die Inscriptionsreihen der Pandekten-Fragmente. Gottingen, 1830. (Reviewed by *Hugo* in the Gött. gel. Anz. 1831, No. 5. See ibid. p. 1164. Jen. Allg. Lit. Zeit. Nos. 107. 108. *Buchholtz* in the

c. Publication of the Pandects.

§ 64. The Pandects were published by Justinian on the 16th day of December, A. D. 533; but they were not to have legal authority until the 30th of that month.[a] At the same time that Justinian confirmed the Pandects, he prohibited all further reference to the older jurists; and in order to prevent legal science from becoming again so diffuse, indefinite, and uncertain, as it had previously been, he forbade the writing of any commentaries upon the new compilation, and only permitted the making of literal translations into Greek (*versiones κατὰ πόδα*) and the publication of parallel passages with a summary table of their contents (*παράτιτλα*).[b]

d. Manner of Citing the Pandects.

§ 65. There always have been, and still continue to be, different ways of citing the Pandects.[c] Formerly it was usual to cite, for instance, thus:

D. de jure dotium L. profectitia § si pater.[d]

or vice versa:

L. profectitia § si pater D. de jure dotium.

From this afterwards originated the following:

L. profectitia 5. § si pater 6. D. de jure dotium.

and lastly:

L. 5. §. 6. D. de jure dotium.

This latest form is that most commonly used at the present day, excepting only that many, more accurately, prefer *fr.* (§ 63. note *d*) instead of *L.*; and that most jurists add at the end in a parenthesis the number of the book and the title; as e. g.

fr. § 6. D. de jure dotium (23. 3.).

In referring to the *principium* of a fragment, *pr.* is put in the place of the mark and number of the §; for example:

Erg. Bl. z. Hall. Lit. Zeit. 1831. Nos. 49. 50.) —See also *Hugo*, Civ. Mag. Vol. 6. No. 4.— The arrangement of the Code is nothing but a casual imitation of the order of the Pandects. See *Böcking*, Inst. p. 68.

(*a*) Justinian published for this purpose two separate constitutions, though they agreed in their material contents, one in Latin and the other in Greek. The former is the const. *Tanta*, 2. Cod. 1. 17; the latter the const. *Δέδωκεν* sive Dedit, 3. c. 1. 17. (The const. *Tanta* is also prefixed to the Pandects, in most editions of the Corpus Juris.)—Besides this, he prescribed by the const. *Omnium reipublicæ*, addressed to the Antecessors, a plan of study in which he defined the method of lecturing upon the Pandects and the other collections in the law schools.—See *Hugo*, Civ. Mag. Vol. 2. p. 261.—Idem, R. G. p. 1056.—*Zimmern*, R. G. § 70.—*Burchardi's* Gesch. u. Inst. § 68.—*Hüpfner*, Comm. § 10.

(*b*) const. *Tanta*, § 21. const. Dedit., § 21.

(*c*) See particularly: *Thibaut*, Civ. Abh. No. 10. *Hugo*, Civ. Mag. Vol. 4. p. 212. Idem, Encycl. 7th edition, p. 254.—*Cramer* in the Z. f. gesch. R. W. Vol. 2. p. 304.

(*d*) This is the mode of citation followed in the Glossa. *D.* signifies Digesta, as do also the letters *ff*. These latter it is supposed by our author,—and indeed by the majority of jurists—originated from the letter *D*, by the addition of a stroke of abbreviation. But a more probable supposition is, that it arose from a careless mode of writing the Greek π; and this is confirmed by the fact that the Latin P or the Greek π, is sometimes used as an abbreviation of *Pandectæ* or *πανδέκται*. See *Hugo*, Civ. Mag. Vol. 3. p. 110. 186. Comp. Themis Vol. 5. p. 47. 115. and *Spangenberg*, Einleitung, p. 166.

fr. 5. pr. D. de jure dotium (23. 3.).

At present, however,[a] many cite only by numbers, either in this manner:

fr. 5. § 6. D. 23. 3.*

or vice versa:

D. 23. 3. fr. 5. § 6., *or simply* D. 23. 3. 5. 6.

As to the 30th, 31st, and 32d books of the Pandects, it deserves to be noticed that they consist only of fragments, and are not divided into titles, but form a treatise of their own *de legatis et fideicommissis*, which is divided into three parts; consequently,

Dig. lib. 30. = lib. 1. de legatis.

Dig. lib. 31. = lib. 2. de legatis.

Dig. lib. 32. = lib. 3. de legatis.

The manner of citing them is therefore this:

fr. 108. § 3. D. de legatis I. *or* D. 30.

fr. 76. § 1. D. de legatis II. *or* D. 31.

fr. 36. D. de legatis III. *or* D. 32.

3. The Fifty Decisions.

§ 66. In preparing the Pandects, the compilers, of course, met very frequently with controversies in the writings of the jurists. But since the citation law of Theodosius was abolished, and consequently neither

(a) The citation by numbers only, was used as early as 1664 in *Brederodii* Repertorium sententiarum, which was published at Frankfort.

* This way of citing merely by numbers, is that now most in use; though many jurists prefer to add the heading of the title. According to the Editor's opinion, the only practical use of this addition is to afford a greater certainty of correctness in citation; since errors are more likely to occur where numbers alone are employed, than where they are combined with the headings of the titles. The other reason given, that this mode of citing produces a greater familiarity with the headings, is certainly of little importance; because this familiarity, although of service in enabling one to refer readily to the Corpus Juris from the old citations, will be obtained by a frequent use of the Corpus Juris itself; besides, the index of titles, which is always annexed, is very easily consulted. Before the beginning of the sixteenth century, neither the books nor titles, nor the fragments nor paragraphs, were numbered in the MSS. and editions of the Corpus Juris. This is the reason why the old jurists (for instance the Glossators) cite the fragments and paragraphs by their initial words, and the title by the heading. When numbering afterwards came into use, they added the numbers to the initial words and the heading; but at length, they omitted the initial words and the heading altogether, or else appended the numbers to the latter only. See *Spangenberg*, Einleitung, p. 162–166. An excellent and very convenient General Index to all parts of the Corpus Juris Civilis and Canonici, of the Codex Gregorianus, Hermogenianus, and Theodosianus, of Pauli Sent. Receptæ, Ulpian's Fragments, the Collatio Legum Mosaicarum and Romanarum, the Consultatio veteris Jurisconsulti, and the Vatican Fragments, has been given by *Blume*, in his Grundriss des Pandectenrechts, p. 121 seqq.

the enumeration of opinions nor the casting-vote of Papinian could be resorted to for the determination of the questions, no other way was left for the compilers, where they themselves did not venture to determine, than to present such controversies to Justinian for his special decision. Such questions, to the number of thirty-four, had been already determined by Justinian before the commencement of the collection of the Pandects,[a] and before its completion the decisions of this kind were increased to fifty. These decisions were at first collected separately, and afterwards embodied in the new Code (§ 69).[b] But it is very doubtful whether they are *all* contained in the Code. The following are said to be the criteria by which they may be distinguished: 1. Their inscription is: *Justinianus Juliano* or *Joanni P. P.* 2. Their subscription is: *Lampadio et Oreste Coss.* 530 or 531, or *anno primo vel secundo post consul. Lampadii et Orestis.* 3. They contain the decision of a controversy between the older jurists.[c]

4. The Institutes.

§ 67. As the Pandects were, from their great extent, little adapted to the purposes of those who were just beginning the study of the law, Justinian ordered Tribonian, with the assistance of Theophilus and Dorotheus, to prepare a brief system of law, under the title of Institutes, which should contain the elements of legal science.[d] They were charged to make the law then applicable their principal object; but they were also to pay some attention to the older law.[e] This work was founded on the Institutes of Gaius (§ 47), so much so, that Justinian's Institutes deserve to be regarded merely as a new edition of the Institutes of Gaius, which had been used up to that time as a guide for the assistance of beginners in the study of the Roman law, but which to a certain degree had become inapplicable. In this new edition of Gaius's Institutes, all that was entirely obsolete was omitted; and on the other hand, the new constitutions of Justinian, as far as they had been issued at the time, were referred to. Justinian published his Institutes on the 21st day of November, A. D. 533; and they obtained legal force at the same time with the Pandects, Dec. 30th, 533.[f] Theophilus, one of the

(*a*) *Schrader*, Civ. Abh. p. 241.—*Hugo*, R. G. p. 1083.

(*b*) const. *Cordi nobis* de emendat. Cod. Just. § 1.

(*c*) See for example const. 12. 13. C. 3. 33. —const. 10. C. 6. 26.—const. 3. C. 6. 29.—const. 31. C. 6. 42.—const. 19. C. 6. 50. See also *Wiehng*, Jurisprudentia rest. Vol. 2. p. 144.—*Höpfner*, Comm. § 7.—*Hugo*, Civ. Mag. Vol. 5. p. 118.— *Schweppe*, R. R. G. § 125.

(*d*) See in general on the Institutes, *Spangenberg*, Einl. p. 58–62.—The purpose for which the Institutes were designed by Justinian, is expressed in the following manner in the Procem. Inst. § 4. "Ut sint totius legitimæ scientiæ prima elementa."—const. de conc. Dig. § 11.—"Ut rudis animus studiosi simplicibus enutritus, facilius ad altioris prudentiæ redigatur scientiam."—See also § 2. J. 1. 1.—Respecting the arrangement of the matters contained in the Institutes, see *Marezoll*, Comm. de ordine Institutionum. Gottingen, 1815.—*Haubold*, Inst. jur. dogm. § 238.

(*e*) Procem. Inst. § 3. in fine.—*Hugo*, R. G. p. 1079.

(*f*) const. *Tanta*, and const. *Dedit*, § 11.—See also the Procemium Institutionum, which

co-editors, delivered lectures on the Institutes in the Greek language; and from these lectures originated the very valuable commentaries known under the Latin title, *Theophili Antecessoris Paraphrasis Græca Institutionum Cæsarearum.*[a]

Division and Citation of the Institutes.

§ 68. The Institutes consist of four books, each of which contains several titles;[b] each title commences with a principium, after which the single paragraphs follow. Formerly the Institutes were cited by the heading of the title and the initial words of the paragraphs; e. g.

§ fratris vero. J. de nuptiis.

At present it is usual to give the heading of the title and the number of the paragraph, as:

§ 3. J. de nuptiis.

or by numbers only; for example:

§ 3. J. 1. 10.

or by joining the number of the title to its heading; as for instance:

§ 3. J. de nuptiis (1. 10.).

in referring to the principium of a title, the abbreviation *pr.* is used; e. g.

pr. J. de nuptiis (1. 10.).

5. The new Code. (*c*)

§ 69. After the publication of the Pandects and the Institutes, Justinian undertook a revision of the Code which had been published in the year 529 (§ 61). This had become necessary, because Justinian had issued since that time a great number of new constitutions, and especially the fifty decisions (§ 66), which were not comprised in the old Code, and by which the law contained in the Pandects had been augmented, altered, or defined.[d] He therefore (A. D. 534) ordered Tribonian, with

is a constitution containing an account of the purpose and contents of the Institutes.

(*a*) Concerning the Paraphrasis of *Theophilus*, see: *Degen*, Bemerkungen über das Zeitalter, &c. des Theophilus. Luneburg, 1809.—*Hugo*, R. G. p. 1097.—*Zimmern*, R. G. § 108. And on the Messina manuscript, see: *Blume*, in the Z. f. gesch. R. W. Vol. 7. p. 370.—Among the editions of the Paraphrase the following are worthy of notice: 1. The text was first published by Viglius von Zuichem, Basle, 1534, fol., and translated into Latin by J. Curtius. Both the text and translation were improved and published by Fabrot at Paris, 1638, and again 1657. The best and most complete edition, with various readings, notes, and an excellent Latin translation, was published by O. Reitz. Hague, 1751, in 2 Vols. 4to.—See *Spangenberg*, Einl. p. 587.—It has been translated into German by *Finke*. Gottingen, 1805. 1809; and with notes, by *Wüstemann*, in 2 Vols. Berlin, 1823.—A new edition of the text was published by *Rhallis*, at Athens, 1836.

(*b*) The whole number of the titles of the Institutes, amount to 98. The common editions erroneously contain one more (99). In most of the editions a table of descents (which should have been placed after § 9. J. 3. 6.) has been omitted: and this circumstance misled the editors into separating the passage *de servili cognatione* from the 6th title, so as to form a *new* title; whilst, according to Theophilus and the best manuscripts, it should be *included* in the sixth title.—*Hugo*, Encycl. 7th Edition, p. 228.—*Hugo*, R. G. a. J. 3d Ed. p. 90.

(*c*) *Spangenberg*, Einl. p. 63–71.

(*d*) *Löhr*, Mag. f. R. W. u. G. Vol. 3. p. 186.

the assistance of Dorotheus, Menna, Constantinus, and Johannes, to revise the old Code, and especially to add the new constitutions. This revision was completed in the same year, and the new edition of the Code (*Codex repetitæ prælectionis*) was confirmed November 16th, A. D. 534, and the old Code abolished.[a]

Its Contents and Divisions.

§ 70. This new Code contains only imperial constitutions, which, from the time of Hadrian up to Constantine, consist almost exclusively of rescripts, but from Constantine to Justinian are chiefly edicts or general laws. The Code consists of twelve books, which are subdivided into titles, and in these the single constitutions relating to the same subject are arranged in chronological order. The name of the emperor who issued it and of the person to whom it was addressed, are generally found at the head of each constitution, and its date at the close; there are, however, many constitutions without date (*sine die et consule*).[b] The arrangement of the subjects is generally the same as that of the Pandects: yet in the first and three last books of the Code, many subjects are treated of, which are omitted in the Pandects;[c] though on the other hand, some constitutions have been overlooked which were contained in the older Code, and to which the Institutes still refer.[d] Besides this, many constitutions which were originally contained in the *Codex repetitæ prælectionis* have been lost, by the negligence of transcribers. Augustine, Charondas, Cujas, and Contius, however succeeded in partially restoring them (in the 16th century) from the Basilica (§ 75), the Acts of the Council of Ephesus, and other ecclesiastical sources; they are for this reason called *leges sive constitutiones restitutæ*.[e] The way of citing the Code is like that of the Pandects, as for instance:

L. 22. C. mandati vel contra.

It is however more correct to use *const.* (constitutio) instead of *L.*,[f] and to cite, either simply for example:

const. 22. C. 4. 35.

or mentioning the heading of the title,

const. 22. C. mandati vel contra (4. 35.).

(*a*) const. *Cordi nobis* de emendat. Cod. Just. § 2. 3.—*Hugo*, R. G. p. 1083. *Zimmern*, R. G. § 49.

(*b*) *Löhr*, Uebersicht, &c. 2d Programme, p. 13 seqq.—The leges restitutæ are *all* sine die et consule; and even many genuine constitutions are without date.

(*c*) *Hugo*, R. G. p. 1086.—*Oberg* de ordine constitutionum Codicis. Gottingen, 1831. Hall. allg. Lit. Zeit. 1832. No. 220.

(*d*) See, e. g. § 11. J. 2. 10.—§ 7. J. 3. 2.—pr. J. 3. 7.—§ 3. J. 3. 8.—pr. J. 3. 10.—*Schaumburg* de constitutionibus quæ in Institutionibus citantur, et in Codice rep. præl. omissæ sunt. Lemgo, 1755.

(*e*) E. g. const. 24. C. 4. 35.—const. 46. C. 1. 3.—A list of these is given in *Spangenberg*, Einl. p. 169–173. see in particular *Witte*, Leges restitutæ. Breslau, 1830. (Reviewed by *Hugo* in the Gött. gel. Anz. 1831. No. 100.) —*Biener*, in the Z. f. gesch. R. W. Vol. 7. p. 115. 243. *Heimbach*, ibid. Vol. 8. p. 81. *Höpfner*, Comm. § 10.

(*f*) Justinian himself uses this term in the const. *Hæc quæ necessario*, § 2. const. *Summa reipubl.*, and const. *Cordi nobis*, pr.

6. The Novels.

§ 71. During the long continuance of his government after the publication of the *Codex repetitæ prælectionis* (from A. D. 535 to 565), Justinian issued at different times a great number of new constitutions, by which the law on many subjects was entirely changed. The greater part of these new constitutions were written in Greek, in obscure and pompous language, and published under the name of Νεαραὶ Διατάξεις, i. e. *Novellæ Constitutiones*.[a] It is doubtful whether Justinian himself really undertook a collection of them as he had intended;[b] but it is certain that no official collection was ever published by him.[c] Soon after his death, a collection of 168 Novels was made,[d] 154 of which had been issued by Justinian and the rest by his successors.[e] Afterwards the glossators brought the Novels into a collection consisting of nine collations (parts); in which however they embodied only 97 Novels, because they considered all the others as no longer applicable.[f] Every collation contains several titles, each of which consists of a single Novel, with the exception of the 8th Novel, which is divided into two titles, and forms the 2d and 3d titles of the second collation; by this is explained how the 97 Novels contained in this collection form 98 titles. The Novels excluded from this collection, were therefore called *extravagantes* or *extraordinariæ*. The later collections contain all the 168 Novels, but in such a manner that the glossed are mixed with the non-glossed: for this reason the numbers and order of the Novels in the non-glossed are very different from those of the glossed editions.[g]

EPITOME JULIANI AND VERSIO VULGATA NOVELLARUM.

§ 72. Soon after Justinian's death, or perhaps under his government, Julian, antecessor at Constantinople, composed a copious Latin extract from 125 Novels, which is known under the name of *Epitome Novellarum* or *Liber Novellarum*, and which afterwards acquired great authority, especially in the West.[h] About the same time a Latin transla-

(a) *Spangenberg*, Einl. p. 72–86. and especially *Biener*, Geschichte der Novellen Justinians. Berlin, 1824. (Reviewed by *Hugo* in the Gött. gel. Anz. 1824. No. 35.) A very good survey of the Novels with respect to the different collections, is contained in *Böcking's* Inst. p. 73 seqq.

(b) const. *Cordi* de emend. Cod. § 4.— Nov. 25. epilog.—Nov. 26. c. 5. § 1.

(c) *Biener*, l. c. p. 38–51.

(d) See *Biener*, l. c. p. 85 seqq., who places the date of this collection in the time of Tiberius, A. D. 578–582.

(e) *Biener*, l. c. p. 93. 98. 103.

(f) *Savigny*, R. R. im M. A. Vol. 3. p. 453.— *Biener*, l. c. p. 262–271.— *Spangenberg*, Einl. p. 129. — See also below, § 95 in notis, where these 97 glossed Novels are noticed.

(g) Besides these 168 Novels, the Corpus Juris contains 13 edicts of Justinian, which properly speaking are likewise Novels; but they make only local provisions for single cities or provinces, and are at present entirely disregarded.— *Kind's* Diss. I. II. de XIII Justiniani Edictis. Leipsic, 1793. 1801. 4to.

(h) *Hugo*, R. G. p. 1101.— *Biener*, l. c. p. 70. 232. 389.—*Zimmern*, R. G. § 49 in fin. and § 110. The Epitome was first published by Boërius at Lyons (1512), afterwards by Miræus (1561), then by Augustinus (1566), and again (which is the best edition) by Pithœus under the title: Imp. Justiniani novellæ constitutiones per Julianum de Græco

tion of the Novels was made by an anonymous author, which contains only 134 Novels.[a] This translation, now termed the *versio vulgata*,[b] was called by the glossators the *Corpus Authenticum*,[c] in order to distinguish it from the *Epitome Juliani;* and is the same after which they divided the Novels that they considered to be applicable, into nine collations.

MANNER OF CITING THE NOVELS.

§ 73. According to the old manner of citing the Novels, which was used by the glossators and which continued to be followed for a long time after, it was customary to place first, "*Auth.*" by which the glossators meant the complete Novels; then the heading of the title in which the Novel was contained in the collection of the glossators; after this the initial words of the paragraph, by which the chapter of the Novel was meant; and at last the number of the collation and generally of the title, thus for instance.

Auth. de hered. ad. intest. § Si quis, Coll. 9. Tit. 1.

This way of citing is now perfectly obsolete, and as the Novels, at least in all the modern editions, are arranged by numbers which run uninterruptedly through the collations, it is usual to cite the single Novels according to their present numbers, without any regard to the collations; for instance, in citing the above passage we would say:

Nov. 118. cap. 1.

translatæ. Basle, 1576. This was reprinted with some improvements in *P. & F. Pithœi* Observationes ad Codicem. Paris, 1689. p. 403. The Epitome is likewise reprinted, from a very correct manuscript, in *Senneton's* edition of the Corpus Juris. Lyons, 1549. 1550. (see below § 104 in notis).—A German translation appeared at Frankfort, 1565.—See concerning the different MSS. of the Epitome: *Haubold*, in the Z. f. gesch. R. W. Vol. 4. p. 133. *Biener*, ibid. Vol. 5. p. 338. *Cramer*, ibid. Vol. 8. p. 136. and *Savigny*, R. R. im M. A. Vol. 2. p. 11.—*Böcking*, Inst. p. 115. —*Höpfner*, Comm. § 11 seqq.

(*a*) *Spangenberg*, Einl. p. 145.—*Biener*, l. c. (§ 71. note *b*) p. 243.

(*b*) This Latin translation, though it is very old, and is that found in the Corpus Juris, is still a very bad one. Better translations were published in the sixteenth and eighteenth centuries, one by *G. Haloander* (1531), the other by *J. F. Hombergk* zu Vach (1717). See below, § 102.

(*c*) Hence the name *Authenticæ*, which the glossators used for those Novels the whole of which were translated, to distinguish them from the extracts of Julian. *Savigny*, R. R. im M. A. Vol. 3. p. 453. 488.

THIRD DIVISION.

HISTORY OF THE ROMAN LAW AFTER JUSTINIAN.

I. In the East.

GREEK TRANSLATIONS OF JUSTINIAN'S LAW COLLECTIONS.*

§ 74. As the Latin language, in which Justinian's law collections were written and published, was not generally used among the Byzantines, they were very soon after translated into Greek, but not so faithfully and literally as Justinian had required.[a] These Greek translations of the Institutes, the Digest, and the Code, though they had no official character, but were made by private persons, soon came to be used more than the originals.[b] That the Novels were also attended to, appears from the work of *Athanasius Scholasticus*, which has been discovered at Paris by Biener, and from a small book of *Psellus*, edited by Berger. In addition to this, numerous constitutions were issued by the successors of Justinian: and although he had expressly forbidden comments on his collections (§ 64), the later jurists disregarded the prohibition; and in a short time a great number of Greek commentaries on Justinian's law collections were published, which of course had special reference to the alterations made in the East, after Justinian. From these causes, the science of law became again so diffuse, and the reference to Justinian's compilations so insufficient, that three centuries later (A. D. 887), a new collection of the law then applicable was made to supply this deficiency.[c]

The Basilica and Leo's Novels.

§ 75. *Basilica.*—The foundation of this collection[d] was laid by the emperor *Basilius Macedo*. He first ordered (A. D. 876) an *abridg-*

(*a*) const. *Tanta* de confirm. Dig. § 21.
(*b*) *Spangenberg*, Einl. p. 585 seqq.
(*c*) Concerning the sources of the Roman and Greek law after Justinian, see particularly *Clossius*, Hermen. p. 87–105.—*Rosshirt* suggests, that through the efforts of *Biener*, *Witte*, the two *Heimbachs*, and *C. E. Zachariä*, copious materials will be furnished for a history of Justinian's law in the East, down to the present time; and that this would be most appropriately reduced to the following *four* periods: 1. from Justinian to Heracleus; 2. from Heracleus to Basilius; 3. from Basilius to the Turkish Conquest; 4. from that time to the present.—See particularly *C. E. Zachariä*, Delineatio historiæ juris Græco-Romani. Heidelberg, 1839. (Reviewed in Richter's Z. 1839, No. 11.) and the same author's Ἀνάκδοτον. lib. 18. tit. 1. Basilicorum cum scholiis antiquis, &c. Heidelberg, 1842.
(*d*) *Suaresii* notitia Basilicorum. Edited with notes by Pohl. Leipsic, 1804.—*Hopfner*,

* With respect to the modern Roman Law, as the term is understood in Europe, the laws and legal writings published in the East, subsequent to the time of Justinian, are of no other than a mere literary value.

ment[a] of the Roman and Greek law, to be prepared for use as a text-book. This work consisted of forty titles. He afterwards appointed a committee of jurists, who were directed to make a compilation of the practical law, in the Greek language; and for this purpose to reduce Justinian's law collections, as well as the single constitutions issued by him and his successors, to a system embracing the whole; and especially to make use of the then existing Greek translations of, and commentaries on, Justinian's collections. This work, having been left unfinished at the death of Basilius Macedo (A. D. 886), was completed by his son, *Leo Philosophus*, who gave it legal sanction, and published it as a code (A. D. 887). This comprehensive Romano-Greek code is called the *Basilica*.[b] The whole consisted of sixty books, which were subdivided into titles, embracing the different matters under their proper heads. About the year 945, the emperor *Constantinus Porphyrogenetus* undertook a new edition of the Basilics (Ἀναχάθαρσις τῶν βασιλικῶν, *s. Basilica repetitæ prælectionis*), through which the work has been preserved to the present time.[c] This Greek code is in many respects of great assistance in the interpretation of Justinian's collections, though it is to be used with much caution.[d]

Of the whole work, only thirty-six books have reached us complete; seven are imperfect, and of the remaining seventeen we have only the extracts furnished by Fabrot. The best and most complete edition is that published at Paris, by Fabrot, in 1647, with a Latin translation and scholia;[e] and to which Reitz (1752) has furnished a supplement,[f] entitled *De diversis regulis juris*, first published by Witte.[g] A Synop-

Progr. de Basilicorum libris. Giessen, 1774. —Extracts from it are contained in *Hugo's* Civ. Mag. Vol. 2. p. 383. where also an account of the literature of the Basilics may be found. p. 410. Comp. also *Sammet*, Hermeneutik. p. 23–26.—*Haubold*, Inst. jur. dogm. edited by Otto. § 306–309.— *Spangenberg*, Einl. p. 571.—*Hugo*, R. G. p. 1102.—*Heimbach* de Basilicorum origine, fontibus, &c. Leipsic, 1825. (Reviewed by F. A. Biener, in the Tüb. krit. Z. Vol. 2. p. 48; and by Zimmern in Schunck's Jahrb. Vol. 5. p. 13.) *F. A. Biener* de collectionibus canonum ecclesiæ Græcæ. Berlin, 1827. § 5. *Biener* in Hugo's Civ. Mag. Vol. 6. p. 56.—Comp. *Barkow* in the Tüb. krit. Z. Vol. 4. p. 193.—*Biener* in the Thémis. Vol. 7. p. 165. Vol. 9. p. 321.—*Berriat-Saint-Prix* in the same periodical. Vol. 10. p. 161. and *Longueville*, ibid. p. 172. See also *Biener*, Geschichte der Novellen, p. 120–157.—Respecting some codices and the Basilic scholiasts, see *Blume* in the Rhein. Mus. Vol. 4. No. 2.

(*a*) In Greek called πρόχειρον τῶν νόμων, i. e. Institutes.

(*b*) This name is appropriate in a twofold respect; for we may assume, either that Leo called the collection *Basilica* in honor of his father (*Basilius*), or else that the appellation signifies *Royal Constitutions* (βασιλικαὶ διατάξεις, or βασιλικὰ βίβλια).

(*c*) *Heimbach*, l. c. entertains an opposite opinion, which is refuted by Biener in the Tüb. krit. Z. Vol. 2. p. 48.

(*d*) As may be seen from *Photius's* Nomocanon, the opinion has prevailed in the East since the twelfth century, that Justinian's law was applicable only so far as it was embodied in the Basilics; just as in the West it was asserted that the authority of this law did not extend beyond the *glossa* (quicquid non agnoscit glossa, nec agnoscit curia).—*Biener*, Geschichte der Novellen. p. 210–213.—*Biener* de collectionibus canonum ecclesiæ Græcæ. Berlin, 1827.

(*e*) *Fabrot*, Basilicorum libros LX. with a translation of the Greek text and the notes of the old jurists. Paris, 1647. 7 Vols. fol.

(*f*) *Reitz*, 49th, 50th, 51st, and 52d books of the Basilica, first edited with a Latin commentary; in *Meermann's* Thes. Vol. 5. p. 1. It was published separately under the title: Operis Basilici Fabrociani supplementum. Leyden, 1765. fol.

(*g*) *Witte*, Basilicorum tituli de diversis regulis juris antiqui. Breslau, 1826. 4to. (Re-

sis or Ecloga of the Basilics has also been published, which is nothing more than an abridgment of them: this was at first disposed alphabetically; but in the edition of Löwenklau (Leunclavius) of 1575, and in the supplements of Labbé, of 1606, it is arranged according to the original order of the books of the Basilics.[a] In searching for the passages of Justinian's collections which were embodied in the Basilics, Haubold's Manual[b] is of great assistance. In like manner, the later editions of the Corpus Juris Civilis by the Kriegel Brothers and by Beck (§ 105), constantly *refer to the Basilics*. A new complete and critical edition of the Basilics, with the scholia, has been undertaken by G. E. Heimbach, and is now in the course of publication, in which the editor *refers* in each of the single passages to *Justinian's collections*.[c]

Novellæ Leonis.—Besides the Basilics, the emperor *Leo* issued many new constitutions, between the years 887 and 893; by which, likewise, alterations of Justinian's law were introduced. The collection of these, undertaken by himself, contains 113 Novels. They were originally written in the Greek language,[d] but were afterwards translated into Latin by Agylæus (published 1560, and again 1561). Since that time they have been added as supplements to the Corpus Juris Civilis.[e]

Constantinus Harmenopulus.

§ 76. Among the later Greek writers on the Romano-Greek law,[f] especially on the Basilics, *Constantinus Harmenopulus* of Constantinople (who died 1382) deserves to be noticed. He wrote a manual of the Romano-Greek law, under the title Πρόχειρον τῶν νόμων, in six books, which was first edited by Adamæus, and published at Paris in 1540. The best edition, containing a Latin translation and annotations, is that of Reitz, of 1780.[g]

viewed by *Biener* in the Tüb. krit. Z. Vol. 2. p. 48. and by *Schröter* in Schunck's Jahrb. Vol. 4. p. 35.)

(*a*) *Leunclavius*, Ecloga sive Synopsis Basilicorum. Basle, 1577. fol. — *Labbæus*, Observationes et emendationes in Synopsin Basilicorum. Paris, 1606. 8vo. 1679. fol.

(*b*) *Haubold*, Manuale Basilicorum. Leipsic, 1819. 4to.—A critical collation of the Basilics with Justinian's collections has been undertaken by *Heimbach*, the first number of which appeared at Jena. 1828, 4to.

(*c*) *Heimbach's* improved edition of Fabrot's Basilica with many additions, a Latin translation, and critical notes. Leipsic, since 1833. —See *Böcking*, Inst. p. 106 note 43.

(*d*) They were first edited in Greek by *Scrimger*. Paris, 1558.—*Beck's* Liber singularis de Novellis Leonis. Edited by Zepernick. Halle, 1779.—*Haubold*, Inst. jur. dogm. Edited by Otto. § 310.

(*e*) They are contained in Greek and Latin, in the edition of *Contius*. Lyons, 1571. They are also collected in *Leunclavii* Jus Græco-Romanum. Frankfort, 1596. and in *E. Bonefidius s. de Bonne Foy*, Jus Orientale. Paris, 1573.—With regard to other Novels of the Byzantine emperors see: *Witte* and *Biener* in the Z. f. gesch. R. W. Vol. 8. p. 153 and 263.

(*f*) *Haubold*, Inst. jur. dogm. § 316.—*Spangenberg*, Einl. p. 575.—*Witte* in the Rhein. Mus. Vol. 2. p. 276. Vol. 3. p. 23.—*Heimbach*, Observationes juris Græco-Romani. P. 1. Leipsic, 1830. (Reviewed by *Hugo* in the Gött. gel. Anz. 1830. No. 169.) See also *Blume* in Rhein. Mus. Vol. 4. p. 225.

(*g*) It will be found in the Supplement to *Meermann's* Thes. p. 1–436; it has also been republished at Athens. 1835.—See also *C. E. Zachariä*, ὁ Πρόχειρος νόμος Imperatorum Basilii, Constantini et Leonis. Heidelberg,

Romano-Greek Law in Modern Greece.

§ 77. After the conquest of Constantinople, and the destruction of the Greek empire by the Turks (in the year 1453), the Greeks became the subjects of the latter; but were allowed, after their submission, to retain their own laws and judges. The Basilics continued, therefore, to be of great authority among them, and even form at the present day the principal foundation of their private law.[a] By a decree of February, $\frac{4}{16}$th, 1830, the president Capo d'Istrias appointed a committee to revise the Basilics and Novels of the old Byzantine emperors, and to embody and arrange in this new work the whole private law then in force among the Greeks.[b] With regard to the mode of developing the law, more enlarged views now prevail in Greece, as appears from the fact that the French Codes, with the proper modifications, obtain admission, as jus scriptum, into the new kingdom.[c]

II. In the West.

A. Roman Law in Italy.*

1. Before the Glossators.

§ 78. Justinian's law collections were at first intended only for the East; but after Justinian (535) had conquered the Ostrogoths, who then ruled Italy, and had again reduced that country under his authority,

1837. (Reviewed in Richter's Jahrb. 1st Vol. p. 1051.), which contains very valuable information respecting the legal literature of the Byzantine empire.

(*a*) Thémis. Vol. 1. p. 201.

(*b*) So the public reports have stated.

(*c*) *Zachariä*, Hist. p. 85 seqq. With respect to the present legal condition of Greece valuable information may be derived from the two following writings: *Maurer*, Das griechische Volk in öffentlicher, kirchlicher, und privatrechtlicher Beziehung, &c. (Greece in its political, ecclesiastical and legal condition.) Heidelberg, 1835.—*Geib*. Darstellung des Rechtszustandes in Griechenland während der türkischen Herrschaft und bis zur Ankunft König Otto I. (Legal condition of Greece during the Turkish government and until the arrival of king Otho I.) Heidelberg, 1835. See Heid. Jahrb. for September, 1836. We may here observe by the way, that in Wallachia and Moldavia the Byzantine law has at all times been used with greater freedom than in Greece, at least in its practical application. See *Clossius*, Hermen. p. 104. The relation of the Greek ecclesiastical law to all the Slavonian nations of the Greek faith and the connexion which Justinian's law has with this fact, will be noticed in § 86. We need only add here, that the modern eccle-

* As we have already remarked (in note * to § 49), the Ostrogoths, Visigoths, and Burgundians, had several law collections of their own; and hence, Justinian's collections could not meet with an immediate reception among them. Indeed, it is not probable that the collections of Justinian were sent into Italy for publication, before the overthrow of the empire of the Ostrogoths (A. D. 554); but after they had been once introduced into that country, their use was not entirely discontinued under the Lombards nor even later under the Franks, although the knowledge and application of this law among them appear to have been very imperfect. It was not until the beginning of the twelfth century that a new impulse was given to the scientific study of the Roman law, by the establishment of the law-school of Bologna. The course of academical instruction there pursued by the teachers of law, consisted in readings from the law books of Justinian, accompanied by brief oral explanations and illustrations.

he immediately sent his law compilations thither, and by special edict ordered them to be introduced into the courts, and to be lectured upon in the law school at Rome; all this he confirmed in his Sanctio Pragmatica of 554, which has been preserved by Julian in his Epitome of the Novels (§72).[a] Notwithstanding all the political changes which took place in the West in subsequent times, the use of Justinian's collections continued uninterruptedly, even under the empire of the Lombards in France.[b] Under the empire of the Franks, however, the *Breviarium Alaricianum* (§ 59) seems likewise to have been introduced, and to have been frequently revised for the use of the Lombardian Romans.[c]

Brachylogus.

§ 79. Amid the general decline of arts and sciences during the barbarism and anarchy of the middle ages, we cannot expect to find much literary disquisition on the law; yet of this period a book has been preserved, which in one of the manuscripts of the Imperial Library at

siastical law of the Greeks is contained in the Πηδάλιον; a work published by the patriarch of Constantinople with the consent of the holy synod, and reprinted at Leipsic, 1800. *Biener* de coll. eccl. Græcæ. § 8.

(*a*) It commences with the words: *Pro petitione Vigilii* § 11, and is to be found among the supplements appended to the Corpus Juris (in the Gottingen edition. Vol. 3. p. 669.). *Spangenberg*, Einl. p. 94.—*Muratori*, Antiquitates Italicæ. Diss. 44.

(*b*) This subject is very ably discussed at large by *Savigny* in his R. R. im M. A. Vols. 1 and 2. and by *Meyer*, in his Esprit, origine et progrès des institutions judiciaires des principaux pays de l'Europe. Hague, 1819. of which 6 volumes have appeared.—See also *Haubold*, Inst. jur. dogm. Edited by Otto. § 938–943.

(*c*) The Lex Romana, first edited by *Canciani*, in his Leges Barbar. Vol. 4. p. 463, is a rewritten edition of this description adapted to Italy. It is found also in *Walter's* Corpus Juris Germanici antiqui. Berlin, 1824. Vol. 3. p. 691. See *Savigny*, l. c. Vol. 1. p. 363. and Vol. 4. p. 470.

These illustrative remarks (glossæ) were inserted by the professors into their manuscripts of the Corpus Juris, that they might be copied together with the text itself. The number of these glosses increased to such a degree, that they formed extensive commentaries on the whole Corpus Juris; and hence it became necessary to make a compendious selection of the best of them, which was effected by Accursius between the years 1220 and 1260. This selection met with universal approval, and was copied at first into the manuscripts and afterwards in the printed editions of the Corpus Juris. It received the name of "Glossa ordinaria," and is the same to which the principle refers: "Quicquid non agnoscit glossa, nec agnoscit curia." The Institutes and the Pandects (with the exception, as remarked § 95, of about fifteen fragments) are glossed throughout. In the Code and in the Novels, on the contrary, there is much that is not glossed. As the text of the Corpus Juris, when originally introduced into Germany, was accompanied by the Accursian gloss, it naturally followed that only so much of it was adopted as was known to the glossators, or at least was recognised by them as valid, and which they had accordingly commented upon. The unglossed parts and passages which were afterwards admitted into the editions, have never been recognised in practice. The merits of the glossators consist in their great services for promoting the correct understanding of the Corpus Juris: in the first place, by the formation of a more accurate text (*lectio vulgata, lectio Bononiensis*); and secondly, by their illustrations, in the course of which they often corrected defective legal definitions, applied principles of law by analogy to the altered circumstances of the times, and contributed greatly by their discussions to the settlement of disputed points.

Vienna is inscribed, *Summa novellarum constitutionum Justiniani Imperatoris*,[a] but is more generally known by the name, *Corpus legum per modum Institutionum*, or *Brachylogus juris civilis*. It contains a brief system of the Roman law. The Institutes form its foundation, though the Pandects, the Code, and the Novels are likewise used. The author of this work is unknown; the title Brachylogus was first chosen by a later editor. This book originated in Lombardy about the year 1100.[b]

2. At the time of the Glossators.[c]

§ 80. In the twelfth century the zeal for the study of the Roman law was revived, especially at the law-school of Bologna. The first who delivered lectures there, was *Pepo;* but he appears to have been of little importance.[d] *Irnerius*, who succeeded him at the commencement of the twelfth century, obtained far greater celebrity, and is to be regarded as the true founder of the reputation of this school.[e] He illustrated the text of Justinian's collections by brief annotations on their subjects and language, which were called *glosses*. At first these glosses were inserted in the text with the words to which they referred (*glossæ interlineares*); but afterwards they were placed in the margin, partly at the side and partly under the text (*glossæ marginales*). In this method of illustration, Irnerius was followed by his scholars and successors; whence they received the name of Glossators.[f] The most celebrated among them are: Bulgarus (who died about 1166) and his opponent Martinus (d. 1165), Ugo or Hugo de Porta Ravennate (d. 1168), Jacobus (d. 1178),[g] Rogerius (d. 1192), Albericus (d. 1194), Wilhelmus de Cabriano, Placentinus (d. 1192) and his oppo-

(*a*) This title, which signifies an abridgment of the latest Justinian law, is regarded by *Hugo* as the original one. Civ. Mag. Vol. 5. p. 24 and 424.—*Hugo*, Beitr. zur Bücherkenntniss. Vol. 2. p. 45. 280. and Gött. gel. Anz. 1830. No. 11.—Another opinion is maintained by *Böcking* in Rhein. Mus. Vol. 4. p. 142.

(*b*) See *Hugo*, R. G. s. J. 3d edit. p. 91.—*Weis* de ætate Brachylogi. Marburg, 1808.—*Spangenberg*, Einl. p. 578.—*Haubold*, Inst. jur. dogm. § 938.—*Savigny*, R. R. im M. A. Vol. 2. p. 238 seqq.—Thémis Vol. 5. p. 266.—The latest critical edition of the Brachylogus is that of *Böcking*. Berlin, 1829. the preface to which contains a detailed account of the manuscripts, editions, age, and sources of this work.

(*c*) Respecting the glossators and their successors, see especially: *Panciroli* de claris legum interpretibus. Venice, 1637. 2d Edition, ibid. 1655. Edited by Hoffmann. Leipsic, 1721. *Mauri Sartii* de claris Archigymnasii Bononiensis professoribus. Edited by Fattorini. Bologna, 1769. 1772.—*Savigny*, R. R. im M. A. Vol. 3. c. 18. 23. 24. and Vol. 4 and 5. See also *Hugo*, R. G. s. J. 3d Edition. p. 105 seqq.

(*d*) *Odofredus* in Digestum Vetus, *L. jus civile* 6. de justitia et jure.—*Savigny*, R. R. im M. A. Vol. 3. p. 395.

(*e*) In the documents of the twelfth century he is sometimes called *Magister Guarnerius*, or *Warnerius de Bononia*; and Odofredus l. c. calls him "primus illuminator scientiæ nostræ," and sometimes "lucerna juris." See also *Hugo's* Civ. Mag. Vol. 6. p. 34 and 388.

(*f*) As to the method of the glossators in lecturing upon the law, see *Savigny*, l. c. Vol. 3. p. 497. 514. Vol. 5. p. 199; likewise *Spangenberg*, Einl. p. 255; and *Eichhorn*, R. G. Vol. 2. § 268.

(*g*) These four are commonly, but without good reason, considered to have been pupils and immediate successors in office of Irnerius, and the latter is said to have characterized them by the following distich:
"Bulgarus os aureum, Martinus copia legum,
Mens legum est Hugo, Jacobus id quod ego."
Savigny, l. c. Vol. 4. p. 64. 67.

nents Henricus de Baila and Johannes Bassianus, Burgundio (d. 1194), Pillius (d. 1208), Cyprianus, Azo (d. 1220), Hugolinus Presbyteri (d. about 1237), Jacobus Balduinus (d. 1235), Roffredus (d. 1243), and lastly Accursius (d. 1260) and his opponent Odofredus (d. 1265).[a] Accursius rendered great service by collecting the glosses of his predecessors and compiling them into a *Glossa ordinaria*, in which he inserted many notes of his own.[b] This Glossa was afterwards enlarged, by additions from the writings of later jurists.[c]

Authentics in the Code.

§ 81. The glossators also endeavoured to facilitate the study of the law by inserting extracts from the Novels of Justinian into those constitutions which were altered or modified by them.[d] These quotations of the Novels were afterwards called *Authenticæ*;* but they must not be mistaken for the complete Novels to which the glossators applied the same name (§ 72). They were embodied in the Code in the same manner as the glosses, and are still to be found in all the editions of the Code, generally distinguished by italics. In the citation of them the word *Auth.* is put first, then the initial words, and lastly the heading of the title in which they are contained; or, according to the later manner, the number of the book and the title, or the heading as well as the number of book and title, as for instance: Auth. *Et non observato* C. de testamentis (6. 23.).

Different kinds of Authentics.—The Authentics found in the Codex are of two different kinds. Most of them (220 in number) are such

(*a*) The others are mentioned by *Savigny*, l. c. Vol. 4. and 5.—Respecting the controversies of the glossators, see *Rogerii Beneventani* de dissensionibus Glossatorum opusculum. Edited by Haubold. Leipsic, 1821. (Reviewed in the Jen. Lit. Zeit. 1821. No. 59. and Leipz. Lit. Zeit. No. 274.); and the same work edited and illustrated with notes by *Hänel*. Leipsic, 1834.—*Savigny*, l. c. Vol. 5. p. 221.

(*b*) *Hugo*, R. G. s. J. p. 145.—*Schrader*, Prodromus. p. 240.—*Savigny*, l. c. Vol. 5. p. 237.—*Spangenberg*, Einl. p. 266.

(*c*) *Claussen*, Spec. denuo edendæ Accursianæ glossæ. Halle, 1827.

(*d*) *Biener*, Histor. Authenticarum Codici et Institutionibus Justiniani insertarum. Sect. 1. 2. Leipsic, 1807.—*Spangenberg*, Einl. p. 135.—*Savigny*, R. R. im M. A. Vol. 3. p. 488 seqq. 532. Vol. 4. p. 39 seqq.—*Höpfner* Comm. § 13.

(*e*) This name is generally supposed to have originated from the expression *glossæ authenticæ*; but in all probability the term *Authentica* arose, through an inaccurate use of language, from the inscription of these passages, viz. "in Authentica"; for by this the glossators understood the Novel from which the extract was derived. (§ 72. note *c*).

* The name *Authenticæ* properly belongs only to the Novels restored by the glossators, in contradistinction to the *extracts* from the Novels, which was composed by Julian, Antecessor (law professor) at Constantinople. Yet this term having erroneously been taken as synonymous with "Novellæ," has also been applied, not only to the decrees of Frederick I. and to extracts from the decrees of Frederick II., but likewise to the extracts made by the glossators from the Novels, which were inserted for convenience sake in the Institutes, and also in the Code, at those passages which were abrogated or otherwise affected by the Novels.

extracts from Justinian's Novels, as have just been mentioned; these extracts, it will be perceived, could have no legal authority, except so far as they agree with the Novels from which they are derived.[a] But the others (13 in number) are extracts from later ordinances of the emperors Frederick I. and II. (about the middle and close of the 12th century), which were in like manner inserted in the Code by the law professors of Bologna;[b] these are called *Authenticæ Fridericianæ*, and are separate ordinances, which, being the latest, have the preference over all the earlier constitutions. They generally have the inscription or heading *Nova Constitutio Friderici*,[c] and are cited like the Novel extracts.

Authentics in the Institutes and Novels.

§ 82. Extracts from the Novels were also inserted by the glossators in the Institutes in a similar manner to those inserted in the Codex, and these were likewise called Authentics. They are to be found in most of the manuscripts containing the Ante-Accursian gloss, though differing greatly in number and contents; but they seldom appear in the manuscripts containing the Accursian gloss, and only in a few printed editions of the Institutes.[d] Although they differ from the common gloss, yet they were for a long time entirely overlooked, and have been but recently brought into notice by Savigny and Hugo.[e] Even in the glosses to the Novels such Authentics are to be found, though only in a few manuscripts.[f]

Influence of the Clergy on the Roman Law.

§ 83. The efforts of the hierarchy of the middle ages for preserving and propagating Justinian's law, have as yet nowhere been traced in all their bearings. The spirit of the Code favouring the clergy,[g]—the ethical basis of the law contained in the Pandects, the language of which was at the same time the language of the church,—and their common source as to their place of origin, united in leading the church to regard the law of Justinian as the legitimate law for the laity, and to consider this law, in the times of concurrent different national laws, as the legitimate secular law of the clergy. The best evidence of this is furnished by the largest yet unprinted *Collectio Canonum* (*Anselmo*

(*a*) This is not always the case, for instance Nov. 117. c. 7. and Auth. *Si pater* C. 5. 24.

(*b*) *Spangenberg*, Einl. p. 139.

(*c*) See e. g. Auth. *Habita* C. 4. 13.—Auth. *Sacramenta puberum* C. 2. 28. Only the Auth. *Gazaros* C. 1. 5. and the Auth. *Omnes peregrini* C. 6. 59. are without this inscription.

(*d*) *Schrader*, Prodromus. § 42 seq. They were first reprinted in *Cujas's* edition of the Institutes (1585) as an appendix; likewise in that of *Bandoza* (1591), who first inserted them in the text. They are now found in the text of *Beck's* edition of the Corpus Juris. Leipsic, 1825; and in *Schrader's* edition. Berlin, 1825.

(*e*) *Hugo*, Civ. Mag. Vol. 3. p. 282. *Spangenberg*, Einl. p. 141. *Biener*, l. c. (p. 67 note *d*) sect. 2. § 22–25.—*Savigny*, l. c. Vol. 4. p. 50 seqq.

(*f*) *Savigny*, l. c. Vol. 4. p. 23.

(*g*) At first the law directed that all dissen-

dedicata),[a] the seventh part of which treats *de laicis*. and derives its contents, under the head, *Capitula legis Romanæ ad eandem septimam partem pertinentia*, for the most part from the Institutes, and the remainder from the Code and from Julian's Epitome. Afterwards the clergy ceased to regard this as their law, when through the celebrated *Collectio Gratiani* (which was likewise undertaken at Bologna, 1151), the designed antithesis of the jus civile and canonicum was introduced, with a view, thus to offer two *universal* law systems to the world.[b]

The Lombardian law, although it was treated as a universal law by the professors, had merely the character of a *national* and municipal law; and the later authority of the *Libri Feudorum* is but incidental.

B. Roman Law in France.

1. Before the Glossators.

§ 84. In the empire of the Franks, who in the time of Justinian ruled over Gaul, the Romans used as their law the Breviarium Alaricianum and the Codex Theodosianus. In France, as well as in Italy, the use of the Roman law continued throughout the middle ages. As early as the middle of the eleventh century, *St. Lanfranc*, archbishop of Canterbury, is said to have taught Roman law, while abbot of Bec in Normandy.[c] Besides this, even before the time of the glossators, reference was made in the legal writings of France to Justinian's collections; the best proof of which is furnished by a book with the title, *Petri exceptiones legum Romanorum*.[d] According to Savigny,[e] this book originated near Valence in France, before the middle of the eleventh century.[f] The author of it is not known otherwise than by this production. The work contains, in four books, a systematic exhibition of the law then applicable in France, which is for the most part Roman law; the sources from which it has been derived are the Institutes, the Pandects, the Code, and the Epitome Juliani.[g]

2. After the Glossators.

§ 85. Soon after the study of the Roman law had been revived in Italy

sions among Christians should be subjected to adjustment by the bishops. But in the course of time, their jurisdiction in regard to secular matters became dependent upon the assent of the parties themselves; and it was only with respect to the large province of ecclesiastical grievances and the law matters of the clergy that the church retained an actual and supreme authority. *Puchta*, Inst. p. 597 seqq.

(*a*) *Savigny*, R. R. im M. A. Vol. 2. p. 274 seqq. and 401.

(*b*) The distinction between the Jus civile and the Jus canonicum, was introduced by Gratian himself. Decreti 1ma Pars. dist. III.

(*c*) *Spangenberg*, Einl. p. 100.—*Haubold*, Inst. lit. § 20.—*Savigny*, R. R. im M. A. Vol. 2. p. 225.

(*d*) *Exceptio* has here, in the language of the middle ages, the meaning of *extract*.

(*e*) *Savigny*, l. c. Vol. 2. p. 130.—See also *Spangenberg*, Einl. p. 583.

(*f*) This work has also been rewritten, so as to be adapted to Italy. And this has occasioned the difference of opinion as to the place of its origin.—*Hugo*, R. G. a. J. 3d ed. p. 92.

(*g*) The second edition of this book, edited by Barkow, will be found as an appendix a the end of the second Vol. of *Savigny*, R. Rt

by the glossators, an equal zeal for it sprang up in the law schools and courts of France.[a] It was probably about this time that the work now called *Ulpianus de edendo*, was compiled in France or the Netherlands. This book furnishes a brief exposition of the manner of proceeding in the courts, extracted from Justinian's collections; its author is entirely unknown.[b] Placentinus, who has been mentioned among the glossators, lectured on the law at Montpellier.[c] Louis IX. called the Saint (1206–1270) ordered a French translation of the Roman law collections to be made.[d] Pierre Desfontaines published, about the year 1253, a work on the French law of custom, comparing it with the Roman law.[e] It is true that, in Paris, lectures on the Roman law, on account of the extraordinary favour they met with and the prejudice which the canon law suffered from it, were forbidden by Pope Honorius III., as early as the year 1220;[f] but this interdict, although it was afterwards renewed by the *Ordonnance de Blois*, 1579, Art. 69, was ineffectual.[g] Since that time the study of the Roman law has formed the foundation of the legal education of the French jurists; many of whom, especially those of the sixteenth century,* are still regarded with high esteem.[h]

im M. A. p. 297.—*Böcking*, Inst. p. 120 note 30. Respecting the manuscripts of this book see *Savigny*, l. c. Vol. 2. p. 130.—*Niebuhr* in the Z. f. gesch. R. W. Vol. 3. p. 412; and *Savigny*, l. c. Vol. 3. p. 663.

(*a*) *Savigny*, R. R. im M. A. Vol. 3. p. 313 seqq.

(*b*) The title of this work was derived from the inscription of its first passage, extracted from Ulpianus de edendo. See *Hugo*, Civ. Mag. Vol. 1. Nos. 7 and 16. And *Wüstemann*, ibid. Vol. 5. No. 12. It was first edited by Spangenberg and Meyerwerth from the manuscript belonging to the Harleian collection in London, which was the only one then known, and was published at Gottingen, in 1809. See *Spangenberg*, Einl. p. 584. Two other manuscripts were afterwards discovered, one in Meermann's collection, which is now in the University library of Liege. (Thémis, Vol. 7. p. 96.) The other MS. was discovered by Cramer at Triers. (*Hugo*, R. G. s. J. p. 94.) A reprint of both these MSS. has been made by *Warnkönig*. Ghent, 1823.—See *Hugo* in the Gött. gel. Anz. 1823. No. 191. *Hänel*, Incerti auctoris ordo judiciorum. Leipsic, 1838.

(*c*) *Savigny*, l. c. Vol. 4. pp. 210. 442.

(*d*) The MS. of a French translation of the Digestum vetus (with the title "Vieux Digeste en 24 livres") of the thirteeth century, is still to be found in the Royal Library of Paris. —Respecting a French translation of the Codex, made at a very early period, see *Cujacius*, Observ. lib. 11. c. 11. lib. 16. c. 24.

(*e*) In his well known work: Le conseil que Pierre Desfontaines donna a son ami. Edited by Du Cange, as an appendix to Joinville's Histoire du St. Louis.

(*f*) This interdict is contained in the cap. *super specula* (28.) X. de privilegiis (5. 33.). Comp. also cap. 10. X. de clericis (3. 50.); cap. 5. X. de magistris (5. 5.). *Savigny*, l. c. Vol. 3. p. 341–344; and *Walter*, K. R. § 355. *Savigny* in the Z. f. gesch. R. W. Vol. 8. p. 225. *Theiner*, Recherches sur plusieurs collections inédites des décrétales. Paris, 1832. p. 16.—Idem, Disquisitiones criticæ, &c. Rome, 1836. The pope's design was to exclude the study of the secular law from the Theological University of Paris.

(*g*) It was repealed by Louis XIV. through the *édit qui règle les études de droit*, in the year 1679.

(*h*) *Haubold*, Inst. lit. p. 58–80.—*Hugo*, R. G. s. J. 3d Ed. p. 254 seqq.

* It may be said that with the close of the brilliant epoch of the glossators, the iron age of the literature of the Roman law began. This is evinced in all the legal productions which appeared in the interval that elapsed before the commencement of the 16th century. Then, however, a new impulse was given to the profound investigation of that law by the efforts of *Alciatus*; who was soon followed by *Cujacius*, *Donellus*, and *Brissonius*, men whose works stand unequalled in the literature of the civil law.

C. Roman Law in England,* Spain, the Netherlands, and Russia.

§ 86. In England, likewise, the Roman law was made the subject of literary treatises at an early period.[a] A Lombardian jurist, Vacarius,

(a) *Savigny*, R. R. im M. A. Vol. 2. p. 139. Vol. 3. p. 379. 664.—*Spangenberg*, Einl. p. 104.—*Jo. Seldeni* Diss. hist. ad Fletam, in C. G. Hoffmann's Hist. jur. Rom. Vol. 1. P. 2.

* It is an important fact as regards the history of the spread of the Roman law in the West of Europe, that this law as it existed before Justinian, was introduced only into those countries which were converted into Roman provinces, as was the case with Great Britain, or in which Roman colonies had been established. The countries which were not subjugated by the Romans, are Denmark, Sweden, Norway, Iceland, Jutland, a part of north Holland, the northern portion of modern Prussia, Poland, and Russia. (*Spangenberg*, Einleitung. p. 90.) After the downfall of the western empire, the Ante-Justinian law was retained, in a modified form, in Italy as well as in the other countries of which that empire had been composed. Justinian's law obtained an immediate entrance only into those countries which were reconquered by him, viz. Italy, Illyria, and Hungary.

The first inhabitants of Britain were a Gallic or Celtic race. They lived, divided into a number of petty tribes, under limited monarchical governments. They had made but little progress in civilization, and were at constant feud with each other. Their priests performed also the duties of secular judges. (*Hume's* Hist. of England, chap. 1.) After conquering Gaul, Cæsar (B. C. 55.) made a descent upon Britain. Although this was not without some effect, the Roman domination in the island was at first only a nominal one. The attempt at subjugation, however, was afterwards repeated under the emperors Claudius and Nero, and was at last successfully carried out under Vespasian, by his general Cnæus Julius Agricola. This conquest, which was accomplished after a war of forty years' continuance, extended over the greater part of Great Britain, viz. England, Wales, and the Lowlands of Scotland. (*Hume*, loc. cit.) Britain, as a Roman province, was placed under a governor with very extensive powers; so that the regulations introduced by him had necessarily a deep and lasting effect. Hence it is correctly observed by Strahan, in his preface to Domat: "We are not to look upon the civil law altogether as a foreign commodity, with respect to England; some of the particular laws thereof having been enacted for deciding controversies which arose here in England, and bearing date from this country. The greatest part of this island was governed wholly by the civil law for the space of about three hundred years, to wit, from the reign of the emperor Claudius to that of Honorius; during which time some of the most eminent among the Roman lawyers, as *Papinian*, *Paulus*, and *Ulpian*, whose opinions are collected in the body of the civil law, sat in the seat of judgment—here in England, and distributed justice to the inhabitants." The laws thus administered were afterwards received into Justinian's compilations. See also *Henry*, Hist. Great Britain, chap. 3. sect. 2. *Kent*, Comm. Vol. 1. p. 545.

The Roman dominion lasted for nearly four centuries, down to the year 448, when the Saxons under Hengist and Horsa came to England. After having furnished the Britons that assistance against the Scots and Picts which the Romans had refused, they turned their arms against the Britons themselves and reduced them to subjection. A hundred and fifty years after the latter event, we find that, in consequence of the continual wars, the inhabitants, language, customs, and political institutions of the country had become totally changed, and that seven Saxon kingdoms had been established in Britain. (*Hume*, loc. cit.) Though the rapid progress in civilization which the Britons had begun to make under the Roman government was interrupted by the Saxons, some of its effects are yet visible at the present day. Municipal institutions with their privileges, which constitute the foundation of political freedom, owe their establishment in Great Britain as well as throughout Europe to the Romans. The Britons had also obtained from their intercourse with the Romans such a knowledge of the Christian religion, that it could not afterwards become entirely extinct. See *Mackintosh*, Hist. of England. Chap. 1. *Savigny*, Hist. Rom. Law. Vol. 1. (Translated by Cathcart.)

With the rise of the Italian universities at the close of the 11th century, a new zeal was awakened for the study of Justinian's law; and a new impulse was given to its

who had studied the law in Bologna, went to England about the middle of the twelfth century, for the special purpose of explaining the Roman law to the clergy. He lectured (1149) at Oxford, and wrote a

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further diffusion, as the fame of these institutions extended to foreign countries, and attracted to them the youth engaged in the study of law. Subsequently academies were founded on the same plan in France, Germany, Switzerland, &c.; in which chairs for teaching the Roman law were established, and intrusted to Italian professors or to lawyers who had been educated in Italy. When the Roman law, after having been consigned for centuries to almost total forgetfulness by the barbarous nations of the middle ages, was again made the subject of learned investigation, the results obtained from the study of it were beneficially applied even to the feudal and ecclesiastical laws, by bringing both of them into well arranged collections after the plan of Justinian's compilations, by tempering their severity, and by affording scientific illustrations of the principles on which they were founded. The ecclesiastical law, which was derived in many respects from that of the Romans, seems to have prepared the way for the adoption of Justinian's law in the countries of continental Europe; for the spiritual courts were imitated by the secular in many parts of their proceedings, as well as in the principles of their decisions: yet as for England, it may be said with perfect truth, that no greater opposition was made to the reception of the Roman law in that country than on account of these very patrons of it, the priesthood. When the study of the Roman law spread itself from Bologna over the whole continent of Europe, England also did not remain unaffected. "It was not long," says Blackstone (Comm. Introd. sect. 1.), "before the prevailing mode of the times reached England. For Theobald, a Norman abbot, being elected to the see of Canterbury (A. D. 1134) and extremely addicted to this new study, brought over with him in his retinue many learned proficients therein; and among the rest Roger, surnamed Vacarius, whom he placed in the University of Oxford, to teach it to the people of this country. But it did not meet with the same easy reception in England, where a mild and rational system of laws had been long established, as it did upon the continent; and though the monkish clergy (devoted to the will of a foreign primate) received it with eagerness and zeal, yet the laity, who were more interested to preserve the old constitutions, continued wedded to the use of the common law. King Stephen immediately (1152) issued a proclamation forbidding the study of the laws then newly imported from Italy; which was treated by the monks as a piece of impiety, and though it might prevent the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries." To this Walter de Mapes alludes in his poem, *De judicio extremo:*

Judicabit judices judex generalis,
Ibi nihil proderit dignitas papalis.
Sive sit episcopus, sive cardinalis,
Reus condemnabitur, nec dicetur, qualis.
Ibi nihil proderit quidquam allegare,
Neque vel excipere neque replicare,
Neque ad apostolicam sedem appellare;
Reus condemnabitur, nec dicetur, quare?
Cogitate miseri, qui et quales estis!
Quid in hoc judicio dicere potestis!
Ubi nullus *Codici* locus aut *Digestis;*
Idem erit dominus, judex, actor, testis.

The year when Magister Vacarius began to deliver his lectures is variously stated. Gibbon gives it as 1140; Robertson (Hist. Charles V.), as 1147; and Reeve (Hist. English Law), as 1149. *Vacarius*, or *Wacker*, was a native of Lombardy. He lectured on both the civil and canon laws. Many historians and jurists (among the latter Blackstone) have erroneously supposed *Rogerius* and *Vacarius* to have been one and the same man; but it has been fully proved of late (see *Wenck's* Magister Vacarius. § 1 seqq.), that Rogerius, of whom we know from history that he was archbishop of York, afterwards papal legate, and was suspended from his see in 1170, was an entirely different person. (*Wenck*, l. c. p. 49 seqq.) Of Vacarius, who it seems delivered his lectures to crowded audiences, we still possess his *Libri ex universo enucleato jure excepti* (called also *Epitome Digestorum et Codicis*), in which he commented on Justinian's compilations. In imitation of the Codex, which then commonly contained only nine books, he divides his comments into nine books, and these again into titles. An extended account of the system and extracts from the contents of his Epitome are given in Wenck's Vacarius. p. 161 seqq.

work on the Roman law in nine books, with the title: *Liber ex universo enucleato jure exceptus et pauperibus præsertim destinatus.*[a] As a general subsidiary law, the Roman law has never been adopted in

(*a*) See particularly *Wenck's* Magister Vacarius primus juris Romani in Anglia professor. Leipsic, 1820. (Leipz. Lit. Zeit. 1821. No. 274.); also *Hugo* in the Gött. gel. Anz. 1821. No. 102; *Dirksen*, Civ. Abh. Vol. 1. p. 319; *Savigny*, l. c. Vol. 4. p. 348; and *Phillips*, R. G. Vol. 1. p. 256 seqq.—*Arthur Duck* de usu et auctoritate jur. civilis in dom. princ. Christ.

When, in the year 568, the Lombards had reduced nearly the whole of Italy to subjection, only two systems of laws were recognised there, viz. the Lombardian and the Roman. The Germans also who dwelt in Italy were obliged to live according to the Lombardian law, except when the privileges of their native law were granted them by the special favour of the king. It was not until the Lombardian kingdom was overthrown by Charlemagne (in 774), that the other tribes living in Italy (the Allemanni, Burgundians, &c.) were likewise permitted to enjoy their own laws. This diversity of tribes dwelling together in Italy, led no doubt to the custom, as exhibited in the charters of that time, of inserting in agreements a declaration (*professio*) of the law under which the contractor lived. Robertson, however, is in error when he says (Charles V. Note 24.), that "every person was permitted to *choose* among the various codes of laws then in force, that to which he was willing to conform." The declaration did not by any means depend on free choice, but was usually determined by national origin. An exception was made in this respect only in the case of the city of Rome, and of the duchy dependent on it; and it was determined by Lotharius I. (in the year 824), that each individual should declare, for himself and his posterity, to what people he wished to be considered as belonging. After the universal spread of the Roman law in the 12th century, these *professiones* but rarely occur. (See *Spangenberg*, l. c. p. 94–96.)

The clergy in their *professiones* generally adopted the Roman law as their own. The influence thus exercised by the clergy on the diffusion of this system has been already spoken of (§ 83). "It seems to be certain," says Robertson, "that ecclesiastics never submitted, during any period in the middle ages, to the laws contained in the codes of the barbarous nations, but were governed entirely by the Roman law. They regulated all their transactions by such of its maxims as were preserved by tradition, or were contained in the Theodosian Code and other books extant among them. They considered it as such a valuable privilege of their order to be governed by the Roman law, that when any person entered into holy orders, it was usual for him to renounce the code of law to which he had been formerly subject, and to declare that he now submitted to the Roman law. (Constat me, Johannem clericum, filium quondam Verandi, qui professus sum, ex natione mea, lege vivere Longobardorum; sed tamen, pro honore ecclesiastico, lege nunc videor vivere Romana. Charta, A. D. 1072. &c.)" The exertions of the clergy to bring the Roman law into general use together with the canon law, was readily promoted by the princes on the continent of Europe, who desired thereby to effect an improvement of the judicial organization in their states, and to restrict the jurisdiction of the nobility. Although the establishing of the hierarchy, by admitting an *imperium in imperio*, bore very hard on the liberties of the people, it was beneficial as respected the organization of courts and the administration of justice. In the exclusive possession of scientific knowledge, surrounded with reverence and respect, branching out in a connected system all over Europe, and in many cases in possession of secular authority, or closely connected with the ruling power, they met with little opposition in extending their jurisdiction, and found little difficulty in raising the ecclesiastical law to the highest rank. And in truth it must be said, that the principles of their law, and especially their manner of administering justice, were far in advance of the secular law of that time and its administration.

In England, however, the state of things was different. William I. had separated the ecclesiastical jurisdiction from the civil, by forbidding bishops to hold pleas in the county or hundred courts, and had limited their power to causes of a spiritual nature in their own tribunals. (*Mackintosh*, Hist. England, chap. 3.) Yet after this, ecclesiastics continued to be employed as judges in the secular courts, until the year 1217; and as chancellors (with a few exceptions), until 1519. Two parties were formed after king

England.[a] It has been cultivated with much greater industry since the sixteenth century in Spain,[b] and in the Netherlands.[c] The jurists of the latter country especially, deserve great praise for their exegetical

(a) *Hugo*, R. G. a. J. l. c.—*Diemer*, Comm. de usu et auctoritate juris Romani in Anglia. Part 1. Leipsic, 1817.—*Falck*, in his preface to Colditz's German translation of Blackstone, Vol. 1. p. 27.—*Phillips* in the Krit. Z. d. Ausl. Vol. 1. p. 400 seqq.

(b) An account of the influence of the Roman law on Spanish jurisprudence is contained in the Spanish translation of this (Mackeldey's) Compendium, by *Collantes Rustamente*. Madrid, 1829.

(c) Concerning the introduction of the Ro-

Stephen's prohibition,—a clerical one, for the advancement of the Roman and canon laws, and a laical one, for the support of the common law; and these exerted themselves with great zeal against each other. "The rivalship and even hostility (says Kent, l. c.) which soon afterwards arose between the civil and common law; between the two universities, and the law schools or colleges at Westminster; between the clergy and laity,—tended to check the progress of the system in England, and to confine its influence to those courts which were under the more immediate superintendence of the clergy." When the clergy attempted to establish as a law the *legitimatio per subsequens matrimonium*, which, though formed after the analogy of the Roman law, was a purely canonical institution,—the party of the nobility, jealous for their ancient feudal privileges, rose as one man, and protested against it with the utmost determination in the memorable words: "Nolumus leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ." "We find," says Blackstone, "the same jealousy prevailing above a century afterwards, when the nobility declared with a kind of prophetic spirit, 'that the realm of England had never been unto this hour, neither by the consent of our lord the king and the lords of parliament shall it ever be, ruled or governed by the civil law.' And thus the dispute was decided in favor of the common law." We should greatly err, however, were we to suppose that it was against the Roman law itself that the English barons were here contending. Their real cause of grievance lay in the injurious assumptions of legal power on the part of the clergy; and their resolution to put an end to this, led them to attack the civil law. This confounding of the Roman law with the law of the priesthood, because, in common with all the science of those times, it wore a clerical aspect, may find some palliation in the consistency and determination with which the English nobility exerted all their strength to resist the encroachments of their ghostly enemies. Still the recognition of the Roman and even of the canon law might have been effected in England as it had been among the continental nations of Europe, without a compromise of temporal rights (*salvis principiis juris feudalis*), although, perhaps, not with such decided effects in repressing priestly arrogance. At any rate, such indiscriminate and scornful attacks ought never to have been begun and continued against a system of legal principles that form the very foundation of all modern jurisprudence, including that of England itself. The English people, it is true, are indebted to their nobility for the unspeakable benefit of protection against the power of the hierarchy; in fact, no nation can show a nobility who have opposed themselves with equal vigour to the insatiable ambition of these pretenders to general supremacy. Yet it is clear that, in this opposition, the English barons had no better end in view, than the maintaining of those prerogatives which historical events and prescriptive enjoyment had conferred upon their order; the upholding especially of the feudal system—that cunning device of tyranny great and small; and the rearing high of the Chinese wall of egotistical exclusiveness, that shuts out all sympathy with the social and political miseries of the rest of their fellow-creatures from the breasts of the pampered Celestials within.

The feudal system can no longer serve as a foundation for the constitution of society. The barbarian's delight in war has given place to the Christian's desire for peace. The lurid glories of martial heroism are waning before the purer light of science and philanthropy. Peaceful industry now occupies the foremost rank. The entire system of military rule, which brought the feudal system into existence, has since fallen to decay. Other means of defence have been devised against both external and internal foes. The progress of political and moral development has kept pace with the advancement of the doctrine of property. Manufacturing industry, which, like a posthu-

and critical labours.[a] In Russia, the Romano-Greek law has never been adopted, and has not even been studied in the universities; neverthe-

man law into the Netherlands, see Mémoires sur les questions proposées en 1780, &c. Brussel, 1783. 4to; and comp. *Savigny*, l. c. Vol. 3. p. 651.

(a) *Spangenberg*, Einl. p. 263. *Haubold*, Inst. lit. p. 122 seq. *Hugo*, l. c. p. 455 seqq. *Van Brandeler*, Diss. de origine et fatis et officiis Ictorum. Leyden, 1814.

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mous offspring, was never subjected to the power of feudalism, has emancipated labour, the primary element of social existence; has created a new power in the state; has restored to the people their original rights; has led them back into the way of nature; has broken the chains of aristocratic tyranny; and has already contributed much to remove the burdens on agricultural industry, on which the true foundations of national prosperity must ever rest. It has now become a generally acknowledged fact, that the whole moral and intellectual advancement of a people, the increase of their national wealth, political freedom, and moral power, are dependent, in a great measure, upon the development of the notion of property. Property is the price of labor. Property, from its very nature, disowns all restrictions upon its acquisition, management, and transfer. It is the image of individual freedom, greatness, and power; a seed that bears fruit a hundred-fold. Unnecessary impediments to the acquisition of property are the height of injustice and impolicy. The accumulating of property upon the few, while the many are debarred from its attainment, inevitably cripples the productive power of a nation, produces a vast amount of misery among its people, undermines the power of the state, and continually endangers its very existence.

The feudal system is utterly foreign to the Roman law, and is one of the peculiarities of the Germanic tribes that will least endure comparison with the Roman institutions. It is true that many English writers have praised the former at the expense of the latter; but in making comparisons of this sort, no national prejudices should be suffered to intervene to the disparagement of that which is of foreign growth. The opinion entertained by many, that the feudal system was first introduced into England by the Normans, is decidedly erroneous. That system originated among the German nations from the policy of their chiefs, who distributed the conquered lands among their companions in arms, as a reward for past and a security for future military services. While these grants ceased with the life of the feudatory, the relation was called a *beneficium*. At the close of the fifth century, or after the subjugation of the former provinces of the western Roman empire by the Germanic tribes, this beneficiary connexion formed the basis of the political organization of Europe, to wit, in Italy, Germany, France, Portugal, Denmark, Sweden, &c., as well as in Great Britain. It was not, however, until the middle of the ninth century, when the beneficiary connexion had become hereditary, that the term *feudum* came into use. And with this agrees what Blackstone says in his Commentaries (Book II. p. 48): "This feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of the national constitution, till the reign of William the Norman. Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who were a swarm from what Sir William Temple calls the same northern hive, something similar to this was in use; yet not so extensively, nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600; and it was not till two centuries after, that feuds arrived to their full vigour and maturity even on the continent of Europe." After the descent of feuds by inheritance had been introduced into England, in common with the other countries of Europe, the owners of *free* lands considered it to be their interest to submit their lands to the feudal rules, in order to secure to themselves the royal protection. This, as well as the hereditary nature of the institution, belongs certainly to the Norman period (see *Blackstone*, l. c. p. 49 seqq.); but it only proves that the feudal system received its *completion* in England at the same time as on the continent of Europe.—With the change of political relations, the feudal system and its principles have become nearly obsolete. The French revolution greatly contributed to expose the injustice of exacting feudal services of all sorts from the inferior feudal tenants, and of exempting the great vassals of the crown from the payment of taxes when their former military services had ceased to be required. Since that time

less, it has not been without considerable influence upon the development of the Russian law, as appears especially from the *Kormtschaga-*

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the feudal system has been regarded as a sad remnant of the tyranny of the dark ages. On the continent of Europe some attempts have been made to diminish its evil effects; but a deep-seated ulcer is difficult to cure.

The relation in which the civil law stands to the English common law, and the origin and development of the latter, as far as it is independent of the former, have never yet been satisfactorily discussed. It is almost impossible to discover the origin of the common law, or even to ascertain the times at which it received its various accessions. Reared on no fixed foundation, and constructed from the accumulations of successive ages, it has been constantly changing during its progress to completion; yet in every stage of its development it has retained the name of "common law." Such being the case, it is not surprising that those who have undertaken to explain the meaning of this term have disagreed with each other, and have failed to furnish any clear and precise definition of it. According to some authors, the common law was in force as a system, even before the Roman invasion. This is evidently mere exaggeration. Others again suppose they have discovered its origin in the period which succeeded the Saxon conquest, when the rude, primitive institutions of the Britons had been augmented and refined for centuries from Roman legislation. Another definition would lead us to consider it as the embodiment of all that was preserved of the ancient English law, after the Norman conquest, together with the accessions then made to it from the feudal law. Another opinion regards Henry II. as the founder of the common law; and it has been suggested, that if this be correct, we may look upon Edward I. as its completer. Admitting the correctness of this last hypothesis, and that the common law was then established so firmly that no radical change in its general principles has since taken place, it is worthy of remark that this was nearly two centuries after it had come into contact with Justinian's law. That it received many additions from that source cannot be doubted; for though the language and form of the Roman law were renounced, the lawyers of the time scrupled not to adopt many of its principles. The manner in which they did this has been noticed by Mr. Reeve in his History of English Law. In speaking on this subject he observes: "Many of the *maxims* of the civil law were transplanted into ours; its *rules* were referred to as parts of our customs, and arguments grounded upon the *principles* of that jurisprudence were attended to as a sort of authority." And again, "such parts of the civil and canon laws as were fitting and expedient, were quietly permitted to grow into practice, while such as were extravagant were clamorously opposed. What was suffered to establish itself either in clerical courts or by mingling with secular customs became so far part of the common law of the realm equally with the Norman; for though of later birth, it gained its authority by the same title, a length of immemorial custom." Mr. Barrington also, in his Observations on the Statutes (3rd edition, p. 76 seqq.), clearly proves that many of the ideas and maxims of the civil law are *incorporated* into the common law of England. The civil and canon laws as such never had, nor have they now, any other authority in England but that of *unwritten* law; and this only so far as they have been introduced in some particular cases, or some particular courts, viz. the ecclesiastical, military, and admiralty courts, and the courts of the two universities. (See *Blackstone*, Comm. Book I. sect. 3. p. 79 seqq.) But, "in former times," says Strahan (loc. cit.), "When the civil law was more universally studied here in England than it is at present, the judges and professors of the common law had frequent recourse to it in cases where the common law was either silent or defective. Thus, we see in the most ancient books of the common law, as *Bracton*, *Thornton*, and Fleta, that the authors thereof have transcribed one after another in many places the very words of Justinian's Institutes. And sometimes the judges upon the bench, in delivering their opinions, have quoted the rules of the civil law as the foundation of their opinion; which Mr. Selden, in his Dissertation on Fleta, has clearly demonstrated from the annals of those times." With respect to the particular branches in which the common law has adopted the principles of the civil law, see *Kent's* Comm. Vol. 1. p. 547. *Hoffman's* Course of Legal Study, p. 505 seqq. And concerning its importance as a source of equity, see *Strahan*, l. c.; and *Story's* Comm. on Equity, Vol. 1. § 23.

Kniga (the ecclesiastical law),[a] and in some measure also from the *Uloshenie* (the secular law).[b]

(*a*) Wien. Jahrb. Lit. Vol. 23. p. 220 seqq.
(*b*) *Clossius*, Herm. pp. 105, 392. See also the Russian translation of this compendium by Roshdestwensky. Petersburg, 1829 and 1830. § 69. Much information respecting the Roman law in the Baltic provinces is contained in a work by *Bunge*, published at Dorpat, 1834. See furthermore *Maciciowski*, Slavische Rechtsgeschichte (History of the Slavonian law; translated into German, Stuttgart and Leipsic, 1835); and *Danilowix's* Lithauisches Statut. Dorpat, 1834.

Chancellor Kent, in speaking of the spread and present authority of the Roman law, observes (Comm. Vol. 1. p. 515), that "with most of the European nations, and in the new States in Spanish America, in the province of Lower Canada, and in one of these United States (Louisiana), it constitutes the principal basis of their own law. It exerts a very considerable influence upon our own municipal law, and particularly on those branches of it which are of equity and admiralty jurisdiction, or fall within the cognizance of the surrogate's or consistorial courts. It is now taught and obeyed, not only in France, Spain, Germany, Holland, and Scotland, but on the banks of the Mississippi and the St. Lawrence. The Roman law is blended with that of the Dutch, and carried into their Asiatic possessions; and when the island of Ceylon passed into the hands of the English, justice was directed to be administered according to the former system of laws in the Dutch courts; and Van Leeuwen's Commentaries on the Roman Dutch Law were translated into English in 1820, expressly for the benefit of the English judiciary in that island."

In Scotland, the civil law has at all times been cultivated and publicly taught. There are three professorships of that law in Scotland, one at each of the universities of Edinburgh, Glasgow, and Aberdeen, which have been maintained with only occasional interruptions; while England has only two such professorships, one of which is *inefficient*, and the other an *absolute sinecure*. (See *Bell's* Comm. on the Laws of Scotland, in the preface.—*Hoffman*, l. c. p. 556; and *Brown's* remarks there cited.)

With regard to the present authority of the Roman law in Italy, Portugal, France, Great Britain, Netherlands, Poland, Denmark, Sweden, Germany, Switzerland, &c. see *Spangenberg's* Einleitung, p. 94–116.

The numerous MSS. of Justinian's compilations extant in Great Britain are mentioned in the work entitled, Catalogi Manuscriptorum librorum Angliæ et Hiberniæ in unum collecti, published at Oxford, 1697; and in *Spangenberg's* Einleitung, are enumerated the MSS. of the Pandects, p. 528–532; those of the Institutes, p. 543–546; of the Code, p. 557–561; and of the Novels, p. 570.

FOURTH DIVISION.

RECEPTION OF THE ROMAN LAW INTO GERMANY.

Sources of the Earliest German Law.

§ 87. In the earliest times, the only law in use among the German nations was the law of custom; and as this was established by opinions and manners, and kept in living remembrance by songs and rhymes, a long time elapsed before committing it to writing was even thought of.[a] We know very little respecting the old German law; and for what we do know, we are indebted to Roman writers, of whom Cæsar and Tacitus are the most important.[b]

Oldest German Law Collections.

§ 88. When, at the migration of nations, the German tribes, particularly the Goths, Burgundians, Franks, and Lombards, founded new states upon the ruins of the western Roman empire (§49–58), they first began (after the close of the fifth century) to collect the German national laws and commit them to writing. Thus originated by degrees, between the fifth and eighth centuries, the Visigothic, the Burgundian, the Salic, the Ripuarian, the Allemannic, the Lombardian, the Bavarian, the Frisian, Saxonic and Thuringian law collections (*leges*).[c] These earliest German law collections, now known also by the name of *Leges Barbarorum*, were written in the Latin of the middle ages; for the German, as a written language, was then only in its infancy. These collections were very meagre and imperfect; they were merely calculated for temporary purposes in those rude times, and chiefly confined to the definition of crimes and penalties, the descent of property, and the forms of proceedings.[d]

Revision of them under Charlemange.

§ 89. The Franks soon acquired an ascendency among the German tribes. Charlemagne, who extended his empire over a great part of Germany, allowed the tribes subdued by him to retain their national laws and customs, but subjected their older law collections to a re-

(*a*) *Tacitus*, Germ. c. 2. *Eginhart* in vita Caroli Magni. c. 29.

(*b*) *Cæsar* de bello Gall.—*Tacitus*, in his Annales and Germania.—*Gebauer*, Vestigia juris germanici antiquissima. Gottingen, 1766.

(*c*) *Lex*, in the language of the middle ages, does not mean a *code*, but a body of law. *Lex Salica* for instance meant the aggregate of the Salic law, as the *Lex Romana* meant that of the Roman law.

(*d*) Detailed accounts of the old German leges, are contained in *Eichhorn's* R. G. Vol. 1. §§ 29–41. 143–148. *Eichhorn*, Deutsch. Priv. R. § 2.—*Savigny*, R. R. im M. A. Vol. 2.—*Mittermaier*, Deutsch. Priv. R. 4th Edition. § 2.

vision, and enlarged and improved them by the so-called Capitularia.[a] The form in which they have been preserved is therefore not the original one, but that which they received from the alterations of Charlemagne.[b]

Capitularia of the Kings of the Franks.

§ 90. A new law source was opened under the government of the Franks by the *Capitularia* of their kings.[c] These were laws in the strict sense of the word, which were published by the kings with the assistance of the clergy on the so-called Marchfield, and afterwards on the Mayfield. They related not only to public and private law, but also to ecclesiastical and beneficiary matters. The first collection of these Capitularies, consisting of four books and three supplements, was made by the abbot Ansegisus (827). Supplements to it were afterwards furnished by Benedict Levita, and others again by an anonymous author under the title, *Quatuor Additiones*.[d]

Books of Forms.

§ 91. Scientific writings on the German law could not be expected at this early period. As law-schools did not then exist, legal knowledge was acquired chiefly by practice. Skilful practitioners, however, especially among the clergy, soon composed certain formulæ for transactions, both judicial and extra-judicial. From these originated the so-called Books of Forms;[e] the most important of which was prepared by the monk Marculf, about the middle of the seventh century.[f]

German Law Collections of the Middle Ages.

§ 92. After Germany, by virtue of the treaty of Verdun (843), had been separated from France and Italy, and especially after the extinction of the Carlovingian line, the authority of their laws gradually disappeared in Germany; and the old German law collections, in consequence of the change of times and manners, fell into disuse. In the turbulent times of the *jus fortioris*, and amid the anarchy caused by the feudal institutions, legal science and the administration of justice could not prosper. When the old national laws and the laws of the

(*a*) *Eginhart*, l. c. cap. 29.

(*b*) They are to be found in *Lindenbrog's* Codex legum antiquar. Frankfort, 1613.—*Georgisch*, Corpus jur. germ. ant. Halle, 1738.—*Canciani*, Barbarorum leges antiquæ; with notes and glossaries. Vols. 1–5. Venice, 1781–92.—*Walter*, Corpus juris Germanici antiqui. 3. Vols. (each in 2 parts). Berlin, 1824. Vol. 1. P. 1. 2.

(*c*) *Eichhorn*, R. G. § 149. 150. Idem, Deutsch. Priv. R. § 3.—*Mittermaier*, Deutsch. Priv. R. § 4.—*Türk*, Deutsch. Priv. R. p. 120.

(*d*) The most complete collection of them is *Baluzii* Capitularia regum Francorum. Paris, 1677. The latest edition is by De Chiniac. Paris, 1780. Basle, 1796. The most important of them are to be found also in *Georgisch*, and likewise in *Walter*, in their collections cited above.

(*e*) *Eichhorn*, R. G. § 156.—*Savigny*, R. R. im M. A. Vol. 2. p. 122.—*Mittermaier*, Deutsch. Priv. R. 4th Edition, § 3.—*Türk*, Deutsch. Priv. R. p. 95.

(*f*) *Marculfi* Formulæ, by Th. Bignon. Paris, 1613. 1665. They are contained also in *Baluzius*, l. c. (§ 90. note *d*); likewise in *Canciani* and *Walter*, l. c. (§ 89. note *b*).—*Seidensticker* de Marculphinis formulis. Jena, 1818.

Franks disappeared, the whole law again rested, solely upon unwritten customs, upon the directions and decisions of the judges and their assessors, and upon agreements of the transacting parties (feudal contracts, services, and tenures).[a] It was not until the thirteenth century that any written collections were made of the laws and customs which existed in single courts, provinces, and cities.[b] A collection of the Saxon laws and customs, under the name of the Saxon Mirror (*Sachsen-Spiegel*), which originated between the years 1215 and 1218, obtained great authority.[c] Another collection called the Suabian Mirror (*Schwaben-Spiegel*) was nothing more than a republication of the Saxon Mirror, adapted to the manners and wants of the states of southern and western Germany.[d] Besides these a great many collections were formed of laws of single states and cities.[e] The works here mentioned, together with others of a similar kind, proved very useful to the judges of those times, and obtained in consequence thereof great authority; but with this exception, nothing was done for defining and perfecting the German law. There were no law-schools, and no scientific writings on the German laws were produced.

Roman Law in Germany.[f]

§ 93. While the law and the administration of justice in Germany was in this depressed condition, the study of the Roman law in Italy and France flourished more and more; and it was not long, before the fame of the University of Bologna and its professors extended to Germany also. From that time the Italian Universities were frequented by German students, who there became familiar with a system of law which was unequalled for extent, coherence, sagacity, and precision. It was very natural, therefore, that on returning to their native

(*a*) *Eichhorn*, R. G. § 257 seqq. and Deutsch. Priv. R. §§ 4, 6.—*Mittermaier*, Deutsch. Priv. R. § 5.—*Türk*, Deutsch. Priv. R. p. 106.

(*b*) *Eichhorn*, R. G. § 258. Deutsch. Priv. R. § 5.—*Runde*, Deutsch. Priv. R. §§ 22, 29–38.—*Türk*, Deutsch. Priv. R. p. 133. See also *Grimm*, Deutsche Rechtsalterthümer. (German law antiquities.) Gottingen, 1828.

(*c*) *Eichhorn*, R. G. § 279–281. Deutsch. Priv. R. § 10. 11.—*Mittermaier*, Deutsch. Priv. R. § 6.—*Weisse*, Deutsch. Priv. R. § 19–22.—*Türk*, Deutsch. Priv. R. p. 152.—*Spangenberg*, Beiträge zu den deutschen Rechten des Mittelalters. Halle, 1822.—The best editions of the Saxon Mirror are those of Gärtner, Leipsic, 1732; and of Homeyer, Berlin, 1827.

(*d*) *Eichhorn*, R. G. § 282; and in the Z. f. gesch. R. W. Vol. 1. p. 142.—*Spangenberg*, l. c.—*Mittermaier*, Deutsch. Priv. R. § 7.—*Türk*, l. c. p. 164.—The best and latest editions are those of Lassberg and Wackernagel.

(*e*) *Eichhorn*, R. G. § 284.—*Mittermaier*, Deutsch. Priv. R. § 9, 10.—*Türk*, l. c. p. 177.

(*f*) *Duck* de usu et auctoritate juris civilis Romanorum in dominiis principum Christianorum. London, 1649. 1653. Leyden, 1652. 1654. Leipsic, 1676.—*Kulpis* de receptione jur. Rom. 1713.—*Senkenberg*, Methodus jurisprudentiæ. Appendix III.—*Pütter*, Beitr. zum deutschen Staats- und Fürstenrechte. Vol. 2. No. 23.—*Runde* in the Deutsch. Mus. No. 1.—*Spangenberg*, Einl. p. 111.—*Vogel*, Untersuchungen über Pandektenrecht. (Researches upon the lawof the Pandects.) p. 18–32.—*Türk*, Deutsch. Priv. R. p. 354.—*Haubold*, Inst. jur. dogm. Edited by Otto. § 943.—See also *Krause*, Abhandlungen aus dem deutscheu Staatsrechte. (Treatises upon German public law.) Vol. 1. Halle, 1795.—*Lapenberg*, in Hugo's Civ. Mag. Vol. 6. p. 198.—*Riccius* in Spicil. quo juris Justin. in aulis German. adoptati usus pragmaticus jam inde a Sæc. XIII & XIV ostenditur. Leips. 1738.

country, and becoming intrusted with public offices, they should endeavour to patronize and apply the Roman law in the German courts. The influence of the clergy likewise contributed essentially to promote the use of the Roman law, in effecting which they were greatly assisted by the near relation that existed between it and the canon law then in force in Germany.* The German emperors and territorial princes, who soon discovered how much the Roman law suited their interest, from the manner in which it regarded the absolute power of the sovereign,[a] were readily disposed to engage in their service jurists educated in Italy, especially such as had obtained the degree of *doctor utriusque juris* (i. e. of the Roman and canon law), and to promote them to the highest offices of state. The Germans also willingly yielded their assent to the use of the foreign law; since their own country could offer them nothing better, and their laws and customs then existing were inadequate even to their former, and much more so to their actual condition, which had become greatly changed by the progress of civilization, by commerce, and principally by the rapid rise and vigorous growth of municipal towns, and the formation of the class of free citizens. Besides, the then prevailing, though erroneous, supposition, that the Romano-German empire was nothing but a continuation of the Roman,[b] contributed much to make the Roman law considered as bind-

(*a*) Quod principi placuit, legis habet vigorem. fr. 1. pr. D. 1. 4. See also fr. 31. D. 1. 3.—On the contrary see *Falck*, in the preface to the translation of Blackstone cited above (§ 86. note *a*. p. 74). p. 29.

(*b*) In the Recessus Imperialis of 1495 the emperor Maximilian calls the Roman emperors Constantine and Justinian *his predecessors* in the empire. *Vogel*, Untersuchungen über Pandecten-Recht. p. 49 seqq.

* Among the laws in force in the German states is to be reckoned the canon law; in regard to which we may add a few remarks, as the "modern" Roman law is modified by it in many respects. Even before the actual appearance of the collection which forms the *Corpus Juris Canonici*, the principles afterwards embodied in it were in force throughout the whole of western Christendom, and especially in Germany, where the visible power of the pope was fully acknowledged. Hence the Corpus Juris Canonici not only acquired authority in spiritual matters and in the ecclesiastical courts, but also exerted an influence over secular affairs, co-ordinately with the Corpus Juris Civilis. In consequence of the oneness of the Roman Catholic church, it was never regarded as a foreign law; and after having been for a long time applied in practice in the same manner as the Roman law, it was formally recognised (in 1495) as binding upon Germany. The force which it received was that of a subsidiary law; that is to say, the German law retained its pre-eminence. But with regard to the Roman law, the canon law, as it is of later origin, regularly has the preference in those few matters which have been differently ruled by them. It remains now to speak of the Corpus Juris Canonici, its constituent parts, and the method of citing them. The Corpus Juris Canonici, at first only a private collection, was confirmed by Pope Gregory XIII., in the year 1580. The following are the principal editions of this collection, including those published before its confirmation. 1. Among the *glossed editions:* the Corpus Juris Canonici, edited by Hugo a Porta, Leyden, 1559 and '60, in 5 vols. folio; and the Corpus Juris Canonici glossatum. Paris, 1561. 2. Among the *critical editions:* that of the brothers Pithœus. Paris, 1687. fol. (reprinted at Leipsic 1695 and 1705); and that of J. H. Böhmer. Halle, 1747. 2 vols. 4to.

The principal division of the Corpus Juris Canonici is that into *Decretum* and *Decretales*.

ing in Germany. When, in addition to this, the German universities were established after the fourteenth century, on the model of those in Italy, and professors of the Roman and canon law were appointed, it was a natural consequence that these foreign laws should become gradually introduced into the German courts[a] from the academical chairs. One of the chief causes of the complete reception of the Roman law appears to have been the change which took place in the judicial administration of the empire, territories, and municipal towns, which not only procured admission to the doctores juris, but naturally led also to the adoption of the whole system of the Roman law. To arrive at correct conclusions, as to the effects of the reception of the Roman law, and its importance at the present time, so much caution and discrimination is required, that it would be necessary to trace, with the greatest accuracy, the history of its dogmas from the time of the glossators,—a task which no one has yet ventured to undertake.

Reasons for its authority in Germany.

§ 94. The authority of the Roman law in Germany is therefore not based on a formal reception by the legislative power, but on its gradual introduction as a law of custom, since the commencement of the thirteenth century.[b] Its authority and general use were established by

(*a*) *Eichhorn*, R. G. § 440 seqq.—Idem, Deutsch. Priv. R. § 14.—*Falck*, Encycl. 3d edition. § 90.

(*b*) This applies exclusively to the law contained in Justinian's collections. *Spangenberg*, Einleitung, p. 111 seqq.—*Höpfner*, Comm. Ed. by Weber, § 15.—*Türk*, Deutsch. Priv. R. p. 354.

I. The *Decretum*, composed in Bologna in the year 1151, by the Benedictine monk *Gratian*. and derived chiefly from two similar collections (viz. the *Magnum Decretorum Volumen Burchardi Wormatiensis*, and the *Decretum Ivonis Carnotensis*), was originally designed for the purpose of making the canon law also the subject of academical lectures, as was shortly after carried into effect in the law-school of Bologna; but it soon came to be regarded by the courts, and even by the Rota Romana, as an official collection. The Decretum was a collection of all the older sources of the ecclesiastical law. The term *decretum* was at that time applied to every *ecclesiastical* law, in contradistinction to *secular* laws (*leges*). The Decretum has often been compared to the Pandects; but *in its form*, it is rather a work by Gratian than a collection of excerpts. Gratian's Decretum first reduced the canon law to a science, and made it an object of academical study. The single passages of the Decretum are usually called *canones* (sometimes *caput* or *capitulum*). The whole work consists of three Parts. The *first Part* (de jure canonico et de personis ecclesiasticis) is subdivided into 101 sections, called *Distinctiones*, which are cited thus:

c. 2. D. 4., *or* c. 2. Dist. 4. (canon 2. Distinctio 4.)

The *second Part* (de judiciis et negotiis fori ecclesiastici) is divided into 36 cases of law, called *Causæ;* each Causa is subdivided into *Quæstiones*, and each Quæstio again into *Canones:* the usual mode of citing is,

c. 1. C. 8. Qu. 2. (canon 1. Causa 8. Quæstio 2.)

The *third Part* (de consecratione) is subdivided into 5 *Distinctiones*, and is usually cited thus:

c. 8. D. 5. de consecratione (i. e. canon 8. Distinctio 5. &c.).

custom, long before a formal recognition of it was made. An explicit legal reception of it has in fact never taken place; all that has been done immediately to that effect was, that in the year 1495, in establishing the Court of the Imperial Chamber, its members were ordered to administer justice in accordance with the imperial and common laws,* by the latter of which the Roman and canon laws were understood.[a] When, thereafter, the territorial power of the German princes became extended, and they organized in their states courts of justice after the model of the supreme courts of the empire, they imitated the organization and rules of the latter so far, that they too referred the members of their courts to the Roman law, or at least tacitly consented to its application.

(a) Reichs-Cammer-Gerichts-Ordnung (Regulations of the Court of the Imperial Chamber) of 1495. § 3.—*Eichhorn*, R. G. § 442.—*Vogel*, l. c. (p. 81. note *b*) p. 49–67.

II. The *Decretales* consist of the Decretales Gregorii IX., Bonifacii VIII., the Clementinæ, and the Extravagantes.

1. *Decretales Gregorii IX.*; a collection published by this pontiff in 1234, consisting of 5 books, each of which is subdivided into titles, and each title into chapters. The contents of these 5 books are often briefly designated by the following hexameter verse:

1 2 3 4 5
Judex, judicium, cleras, sponsalia, crimen.

These Decretals, in citing, are denoted by an *X.* (for *extra*), because they form a collection *extra* Decretum; thus, e. g.

cap. 8. X. de regulis juris, *or* cap. 8. X. de regulis juris. (5. 41.), *or* cap. 8. X. 5. 41.

2. *Decretales Bonifacii VIII.*, called also Liber Sextus Decretalium; a collection of supplements published in 1298, which is cited thus:

cap. 2. de exceptionibus in VI., *or* cap. 2. de exceptionibus in 6to.

3 *Clementinæ*, published 1313; a supplement that owes its origin to Clemens V. and is cited thus:

cap. 2. de appellationibus in Clem. *or* Clem. 2. de appellationibus.

4. *Extravagantes Joannis XXII.* and *Extravagantes communes*. The former consist of twenty decretals of John XXII.; the latter are divided into five books.

In addition to the above, the later editions usually contain, in the form of appendices, the so-called Liber Septimus, and also Lancelott's Institutes; neither of which have any legal authority. So likewise the two collections of Extravagantes made since 1582, are not regarded as laws, except in those matters where they are especially received as such by the courts. Further remarks on the history of the sources and doctrines of the canon law, are reserved by the Editor for a work on ecclesiastical law, which he designs to publish in the course of the ensuing year.

* The term "common law" is used in Germany to denote the subsidiary law common to the several German states, in opposition to the laws of the individual states. Its constituent parts are: the German law, the Roman law, the canon law, and the Lombard feudal law. As some observations have already been made respecting the canon and feudal laws, itis only necessary here to speak ofthe German law.

By the German private law are meant all those purely German legal maxims which form the common foundation and principal features of the particular laws of the different states; for although the laws of the several states were developed independently of each other, a certain intrinsic unity, in many branches of the law, has still been preserved amid all their peculiarities. This private law rests solely on laws of custom, and thus exhibits the nature of the genuine German institutions; it must not, there-

Special Rules for its application in Germany.[a]

§ 95. The law of Justinian has no other legal force in Germany than that which it acquired by its reception. From this general principle the following special rules are derived for its application at the present day.

1. *The Roman law forms in Germany in some branches the principal law;* that is, it so far forms their principal basis, that the German law only adds to or modifies it. *In other branches it is only supplementary (in subsidium);* that is, it only supplies the German law. The mutual relations, however, between the Roman and German laws in each branch, must be shown in each of the single branches separately.[b]

2. *Only those parts and passages of Justinian's law collections are of force in Germany, which are glossed.* "*Quicquid glossa non agnoscit, illud nec agnoscit curia.*" This principle does not account for the great authority of the glossators;[c] but its reason is chiefly this, that only the glossed parts and passages were considered as applicable, and therefore they only came into use. The *glossed* parts are: the Institutes, the Pandects, the Code, and 97 of the Novels. There are *non-glossed* passages, however, in the Pandects, viz. fr. 7. § 5. fr. 8. 9. 10. 11. D. 48. 20.—fr. 17. 18. 19. D. 48. 22. and the fragment between fr. 18 and 19. D. 50. 17. To the non-glossed constitutions of the Code belong particularly the *leges restitutæ* (§ 70) and the whole title *de*

(*a*) *A. D. Weber*, Vers. No. 1.—*Glück*, Einl. § 64 seq.—*Spangenberg*, Einl. p. 167–182.

(*b*) Reichs-Hofraths-Ordnung (Regulations of the Court of the Imperial Council) Tit. 1. § 15.—*Dabelow*, Handb. d. R. R. Vol. 1. p. 208.—*Eichhorn*, Deutsch. Priv. R. § 28. The Roman law is in most of the German states authoritative in regard to all matters of law that are not regulated by the laws of the single states; and even with respect to those states which have in later times established complete codes, the Roman law continues to be of such legal value, that it applies to them subsidiarily, so far and in such manner as its principles were adopted by the legislators.

(*c*) The private opinions of the glossators have therefore as little legal authority as those of any other distinguished jurists; and for the same reason the Authentics in the Code and Institutes added by the glossators are of legal value, in so far only as they agree with the Novels from which they are extracted. See *Haubold*, Inst. jur. dogm. § 899. *Osenbrüggen* in Linde's Z. f. Civ. R. u. Proc. Vol. 15. No. 2.

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fore, be regarded as formed merely from the concordant principles found in the laws of the different states. The principal objects of the German private law are: the personal rights of the classes (nobility, citizens, and peasantry); the rights of corporations, especially of towns and villages; the rights of things, especially with regard to mortgages and feudal restrictions on property; family rights and rights of inheritance; the rights of trade and commerce; also the rights connected with bills of exchange and feudal services, both of which are entirely unknown to the Roman law; and lastly, the rights of obligations which are either attached to contracts unknown to the Roman law (as those respecting lotteries, state stocks, agreements between authors and publishers, and the like), or else to such as are modified by the German law.

The many new legal views and principles introduced by the Roman law were either applied so as to render the German private law more complete, or else were modified so as to harmonize with it. (See below, note * to § 103.)

aleatoribus (3. 43.).[a] The 97 glossed Novels[b] are the same that were originally reduced by the glossators to nine collations (§ 71).

3. *Only those of the glossed passages in Justinian's collections are binding, which contain the latest legal rule* (§ 96). Consequently, the historical materials comprised in them, though of great importance for discovering the latest law, cannot be said to have legal force.

4. *Those precepts of the Roman law which relate to Roman manners and institutions unknown in Germany, are inapplicable there, though glossed.* Accordingly all that relates to the public institutions and government of Rome does not apply in Germany, unless an exception can be proved.[c] In like manner such precepts are inapplicable which rest upon principles that have never been acknowledged[d] in Germany, or the objects of which do not exist there.[e]

5. *The Roman law does not admit of application to such objects and transactions, as were unknown to the Romans, and are purely of German origin.* These are determined according to the German laws and customs; and the principles of the Roman law can only be extended to them, by way of analogy, with great caution.[f]

6. With the restrictions above enumerated, *the Roman law has been adopted as common law in complexu;* that is, as a body, and not by single principles. Therefore, he who can refer to a precept of the Roman law in support of his case, has, as the practitioners call it, a *fundata intentio;* that is, the presumption is in favor of the validity and applicability of the precept referred to, until his adversary proves that it is included in one of the above-mentioned exceptions, or that it can no longer be applied, or that it has been abolished by later law.

In cases of Conflict. [g]

§ 96. If two or more passages of the Roman law collections, which concern the same matter, appear to be in conflict with each other, it must first be ascertained whether they really are contradictory, and

(*a*) *Hugo,* Ueber die nicht glossirten Stellen im Codex. (On the non-glossed passages of the Code.) Jena and Leipsic, 1807.—*Spangenberg,* Einl. p. 167 seqq.—*Glück* zu Günther. p. 271 seqq.

(*b*) They are according to the present method of numbering: Novels 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 12. 14. 15. 16. 17. 18. 19. 20. 22. 23. 33. 34. 38. 39. 44. 46. 47. 48. 49. 51. 52. 53. 54. 55. 56. 57. 58. 60. 61. 66. 67. 69. 70. 71. 72. 73. 74. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 105. 106. 107. 108. 109. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 123. 124. 125. 127. 128. 131. 132. 134. 143. 150. 159.—See *Cramer* in Hugo's Civ. Mag. Vol. 3. Nos. 2. and 7.—*Savigny* in the Z. f. gesch. R. W. Vol. 2. p. 115.

(*c*) This is the case, for instance with the privileges of the fiscus. See below, § 144.

(*d*) E. g. the principle that a pactum nudum does not produce an action.

(*e*) E. g. the law applicable to slavery.

(*f*) E. g. the communion of property between husbands and wives, the pacta hereditaria, &c.

(*g*) See on this: *Schöman,* Handb. des Civilr. Vol. 1. p. 1 seqq.—*Thibaut,* Civ. Abh. No. 6.—*Hufeland,* Geist d. R. R. Vol. 1. p. 123.—*Spangenberg,* Einl. p. 185.—*Löhr* in the Mag. f. R. W. u. G. Vol. 3. p. 211.—*Hœnlein* de off. et potest. judicis, &c. Erlangen, 1817.—*Seuffert,* Erörterungen. Vol. 1. p. 36.—*Fritz zu Wening.* Part 1. p. 10–17. —For the old literature, see *Haubold,* Inst. jur. dogm. Edited by Otto. § 300.

whether the contradiction may not be settled by a critical examination of the text, or by interpretation; where this is ineffectual, the general principle applies, that *the latest law has the preference* (§ 6). In its special application to each case of collision, the individual purpose and character of the single law collections is constantly to be regarded. Hence the following special rules are to be observed:

I. The later law is to be preferred, wherever its provisions are in conflict with those of an older law. From this it follows: 1. that the *Novels* (in Germany only those which are glossed) are preferred to the Code; and among the Novels themselves the more recent have the preference over the earlier.[a] 2. That the *Codex* has the preference over the Institutes and Pandects, on account of its later compilation, and because it forms a new revision of the then existing law. With regard to the legal force of a constitution contained in the Code, no distinction is made at present, as to whether it be an edict, rescript, or decree.[c]

II. If the contradiction is owing to the historical reference of one of the passages to the older law, and the other contains the applicable law, this latter of course has the preference.

III. When the *Institutes* and *Pandects* are in conflict, that cannot be reconciled by a critical examination, emendation, or distinction, it is not settled which is to have the preference. Considering, however, that according to Justinian's plan, the Pandects were chiefly intended as a book of reference for practice, the Institutes on the contrary, merely as a class-book for students, and that the Institutes were not designed to introduce a law different from the Pandects,—the Pandects ought to be preferred,[d] except in those instances where the Institutes may be proved to contain later law, as is especially the

(*a*) fr. 4. D. 1. 4. "Constitutiones tempore posteriores potiores sunt his quæ ipsas præcesserunt. cap. 1. de Constit. in 6to.

(*b*) For determining of the dates of the several Novels, see *Biener's* Gesch. der Novellen. (History of the Novels.) p. 500–530.

(*c*) As to the distinction mentioned in the text, it is true that the edicts, rescripts, and decrees are at present of equal force, because they were invested with the character of laws by Justinian's const. 12. pr. C. 1. 14; see *Lohr*, l. c. p. 214. and especially *Guyet*, Abh. p. 39. A distinction, however, is to be made between them in regard to interpretation, since the rescripts originally referred only to single cases. See *Zimmern* in Schunck's Jahrb. Vol. 12. p. 41–45. But as for the relation of the Pandects to the Code, Rosshirt asserts that, according to the common opinion, they are to be regarded as one work, the contradictions of which could be reconciled only by reference to the history of their principles. Indeed, the opinion of Mackeldey in the text, which is supported of late also by Göschen (see his Pandecten-Vorlesungen I. p. 14.), who refers to the fact that Justinian himself had considered the Codex repetitæ prælectionis as a later publication than the Pandects, seems to be incorrect; and Thibaut in his System (§ 35) justly remarks that those passages of the Code which contradict the Pandects, do not alter the law of the latter, but merely show that its contents only refer to history. For it can not well be supposed, that Justinian should have changed his mind so often, as to abolish in 533 (through the Institutes and Pandects) the law established by him in 529 (through the old Code), and to alter it again in 534 (through the new Code, which certainly was little more than a republication of the old one).

(*d*) See *Thibaut*, Civ. Abh. p. 95. and especially p. 352.

case when they refer to later constitutions, by which the law has been modified.

IV. If passages in *the same collection* contradict each other, that opinion is preferred which the compilers have expressly approved of; but for cases where no such approval is given, no general principle can be advanced. In such cases, the historical and intrinsic coherence of the department to which the conflicting passages are related, analogy, the place given to them in the compilation, their age, their character, and their arguments, must all be considered, in order to interpret and reconcile them. Which of these shall be conclusive in each case, can only be left to the sagacity of the interpreter.[b]

(*a*) Justinian himself does not admit the existence of any contradictions in the Pandects: for he says in the const. *Tanta* § 15: "Contrarium autem aliquid in hoc Codice (juris enucleati) positum nullum sibi locum vindicabit, nec invenitur, si quis subtilli animo diversitatis rationes excutiet." See also const. *Dedit* § 15.—*Hänlein* de officio et potestate interpretis circa antinomias in Pandectis obvias. Erlangen, 1817.

(*b*) *Löhr*, l. c. p. 215.—*Schömann*, Handbuch. Vol. 1. p. 8 seqq.

FIFTH DIVISION.

COLLECTIONS OF THE SOURCES OF ROMAN LAW.

Collections of Ante-Justinian Law Sources.[a]

§ 97. Among the editions of collections of the Ante-Justinian law, none of which however embraces all the sources that have been preserved, the following deserve to be noticed:

1. *Jurisprudentia vetus Ante-Justinianea ex recens. et cum notis Ant. Schultingii.* Leyden, 1717. The new edition by *G. Henr. Ayrer*, Leips. 1737, only contains the most important of the extant Roman law writings, the *Legum Mosaicarum et Romanarum Collatio* (§ 57), and some remains of earlier collections of constitutions, especially of the *Codex Gregorianus et Hermogenianus* (§ 54); but not the *Codex Theodosianus* (§55), and of course not the *genuine* Institutes of Gaius (§ 47), which were discovered much later, but only such as they are contained in the *Breviarium Alaricianum* (§ 59).

2. *Jus Civile Ante-Justinianeum Codicum et optimarum editionum opera societatis Ictorum curatum; præfatus est et indicem editionum adjecit Hugo.* Berlin, 1815, 2 Vols. This collection, the promised preface of which is still wanting, comprises, besides the contents of the one above mentioned by Schulting, the *Codex Theodosianus* (see § 55); but does not contain either the genuine Gaius, or the *Fragmenta Vaticana* (§ 57).

3. The *Corpus Juris Civilis Ante-Justinianei, consilio et cura Professorum Bonnensium Aug. Bethmann-Hollweg, Ed. Böcking, Jo. Chr. Hasse, Ed. Puggé, aliorumque.* Bonn, from 1830 onward. The following parts of this collection have already been published: *Gaii Institutionum Commentarii IV.* by Heffter; *Gaii Institutionum libri II ex lege Romana Visigothorum*, by Böcking; *Ulpiani fragmenta*, by Böcking; *Volusii Mœciani de assis distributione, Fragmentum Sexti Pomponii, Dosithei Interpretamenta, Fragmentum veteris Icti de jure fisci, Fragmentum Modestini*, by Böcking; *Julii Pauli Receptæ Sententiæ* by Arndts; *Legum Mosaicarum et Romanarum Collatio* by *Blume; the Codex Theodosianus*, by Hänel; likewise the *Codex Gregorianus et Hermogenianus*[b]

CORPUS JURIS CIVILIS.

I. The Institutes.[c]

§ 98. Justinian's collections were in ancient times always copied sepa-

(a) *Hugo*, Ind. font. (appended to his edition of Pauli Sententiæ Rec.). Berlin, 1795. p. 123.—*Haubold*, Inst. lit. 217 seq.—*Clossius*, Hermen. p. 46–70. Concerning the sources of the Romano-Greek law after Justinian, see above, § 74–77. and *Clossius*, Hermen. p. 87–105.

(b) See §§ 47. 48. 54–58.

(c) See *Spangenberg*, Einl. p. 401–950.—Indicis codicum et editionum Juris Justinia-

rately, and afterwards they were printed in the same manner. When taken together, they were indeed called at an early period, the *Corpus Juris Civilis;*[a] but this was not introduced as the title comprehending the whole body. Each volume had a title of its own,[b] until *Dionysius Gothofredus* introduced this general title in the second edition of his glossed *Corpus Juris Civilis* (1604). Since that time this title has been used in all the editions of Justinian's collections. The older editions of the Corpus Juris, which are not uniform in the arrangement of its single parts, differ entirely in that respect from those of later date. The latter arrange them in this order: 1, Institutes ; 2, Pandects; 3, Codex; 4, Novels.

There are still many manuscripts of the *Institutes* in existence.[c] Among the oldest known to us, are: 1. One of Bamberg, of the ninth or tenth century;[d] 2. One of Turin, of about the same age ;[e] and, 3. One formerly of Seissenstein, likewise of the tenth century.[f] Of the principal editions,[g] the following may be mentioned: I. The *editio princeps*, Mayence, by Peter Schoyffer of Gernsheym. 1468. fol. 2. The *editio Haloandrina* by G. Haloander. Nuremberg, 1529. 8vo. 3. The *editio Cujaciana*, by Jacob Cujas. Paris, 1588. 12mo.[h] J. B. Köhler founded his edition, published at Gottingen, 1772, upon this of Cujas, and added to it critical notes.[i] 4. The edition of Biener.[k] 5. That of Bucher, from an Erlangen manuscript.[l] 6. That of Rossberger, with a

nei prodromus; edited by Beck. Leipsic, 1823.—*Clossius*, Hermen. p. 29–46. p. 105 seqq.

(*a*) In contradistinction to the Corpus Juris *Canonici*. The first suggestion for the title Corpus Juris, may have been found in the words "Corpus omnis Romani juris," used by Livy in lib. 3. 34., in speaking of the Twelve Tables. The term Corpus Juris was used by Justinian with respect to all the sources of the Roman law in const. un. pr. C. 5. 13. The expression Corpus juris civilis was frequently applied to all the collections of Justinian, in the twelfth and thirteenth centuries. *Savigny*, R. R. im M. A. Vol. 3. p. 478.—Dionysius Gothofredus however was the first who applied it as a title embracing all the collections of Justinian in *one work* (1604), although they had previously been comprehended in the edition of Baudoza (1593), under the general title: *Universi Juris Civilis* in quatuor tomos distributi *Corpus*.

(*b*) Thus the first volume was called *Digestum vetus*; the second, *Infortiatum*; the third, *Digestum novum*; the fourth, *Codex repetitæ prælectionis*; the fifth, *Volumen parvum*, or simply *Volumen*. See below, § 104. and *Savigny*, l. c. p. 478.

(*c*) *Eckhardt*, Hermen. jur. edited by Walch. p. 143.—*Schrader*, Abh. aus d. Civ. R. Vol. 1. p. 198.—*Spangenberg*, Einl. p. 532. See also *Rosshirt*, Beitr. No. 1. note 1. and *Dirksen* in the Z. f. gesch. R. W. Vol. 1. No. 16. Upon the manuscripts of the Institutes, see *Schrader*, Prodromus. p. 35 seqq. and also *Clossius* de vetustis nonnullis membranis. Dorpat, 1827.

(*d*) *Schrader*, l. c. p. 36.—*Rosshirt*, l. c.

(*e*) This remarkable manuscript was first discovered in 1820, by Clossius, in the Royal Library at Turin. See about it *Schrader*, l. c. p. 55. XC. and *Savigny*, R. R. im M. A. Vol. 3. p. 655. 674., where the Turin gloss will be found.—*Schrader* in the Tüb. krit. Z. Vol. 1. p. 119.—*Hugo*, R. G. a. J. 3d edition. p. 86.

(*f*) See *Eckhardt*, Hermen. jur. l. c.—*Schrader*, Civ. Abh. p. 201.—*Schrader*, Prodromus. p. 66.

(*g*) Concerning the old editions, see *Schrader* in Hugo's Civ. Mag. Vol. 4. p. 439.—*Schrader*, Civ. Abh. p. 505. Also *Spangenberg*, Einl. p. 456.

(*h*) See respecting this edition *Hugo*, Civ. Mag. Vol. 3. p. 238.

(*i*) *Wüstemann* in his preface to Theophilus. p. 9 seqq.

(*k*) Published, Berlin, 1812. It contains a list of the different editions. (Reviewed by *Hugo* in the Gött. gel. Anz. 1813. p. 1345.)

(*l*) Published at Erlangen, 1826. Compare with this *Hunger's* Criticæ observationes in Cod. Heilbronnensem. Erlangen, 1826.

German translation.[a] 7. The synoptical edition of the Institutes of Justinian and Gaius, by Klenze and Böcking.[b] 8. The edition of Schrader, which forms the first part of the Corpus Juris Civilis, edited by him in connexion with several others.[c] 9. That of Vogel.[d]

II. The Pandects.

§ 99. Among the manuscripts of the *Pandects*, the Pisa or Florentine MS. is by far the oldest,[e] the most celebrated, and the most valuable; though it contains many specimens of the ignorance of the transcribers, and is defective in the 48th book.[f] All the other manuscripts, which were for a long time erroneously considered to be nothing but copies of the Florentine, were called *manuscripta vulgata* or *codices vulgati*,[g] to distinguish them from it. The Florentine copy was probably made in the seventh century by a Greek at Constantinople, whence it was brought to Italy. It was first found at Pisa,[h] and continued there up to the year 1406, when it was removed to Florence, where it still remains.[i] An examination and comparison of this manuscript, was first undertaken by Polizian (who died 1494), and continued by Bolognini (d. 1508) and Augustin (d. 1586).[k] Lelio and Francis Torelli (father and son) published the first printed edition of it at Florence, in 1553.[l] This, however, was not merely a copy; for the passages that gave no sense were amended, and defective places supplied from the *manuscripta vulgata*, the changes derived from the latter being distinguished by certain marks. The last careful collation of the Florentine manuscript was undertaken by H. Brenckmann, the results of which are given in the notes to the Gottingen edition of the Corpus Juris Civilis.[m]

Different editions.—The printed editions of the Pandects differ greatly from each other, as regards the readings they contain. They are divided in three principal classes,[n] and follow either: 1. the *lectio*

(*a*) Published at Berlin, 1829. (Reviewed by *Schrader* in the Tüb. krit. Z. Vol. 6. p. 41.)

(*b*) Berlin, 1829. (Reviewed by *Unterholzner* in the Tüb. krit. Z. Vol. 6. p. 29. 42.)

(*c*) See below, § 105 in notis.

(*d*) Published at Leipsic, 1833.

(*e*) Its date is commonly placed in the seventh century; all the other manuscripts of the Pandects now existing are much more recent.

(*f*) See *Hugo*, R. G. s. J. p. 89.—*Spangenberg*, Einl. p. 405.—*Haubold*, Inst. jur. dogm. § 274.

(*g*) *Brenckmann*, Historia Pandectarum. Utrecht, 1722. II. 2.—*Bach*, Hist. jur. IV. 3. § 6.—*Eckhardt*, Hermen. jur. I. 2. § 68–74.—*Eichhorn*, R. G. § 267.—*Spangenberg*, Einl. p. 405 seqq. 497 seqq.—*Schrader*, Abh. aus d. Civ. R. Vol. 1. p. 237.—*Savigny*, R. R. im M. A. Vol. 2. p. 148. Vol. 3. p. 410 seqq.

(*h*) It was generally believed for a long time, that this manuscript was discovered at Amalfi, and was presented by Lotharius II. to the city of Pisa; but this supposition has been shown to be unfounded, by Asti (1722), and again by Grandi (1727).—*Hugo*, R. G. s. J. p. 451.—*Savigny*, R. R. im M. A. Vol. 3. p. 83.

(*i*) *Förster* in the Z. f. gesch. R. W. Vol. 2. p. 271.

(*k*) *Haubold*, Inst. lit. § 42. No. 105.—*Hugo*, R. G. s. J. p. 233.

(*l*) *Hugo*, l. c. p. 238.

(*m*) *Spangenberg*, Einl. p. 448 seqq.

(*n*) *Thibaut*, Vers. 1. No. 14.—See also *Dabelow*, Handb. d. Pand. R. P. 1. p. 192 seqq.—*Falck*, Encycl. § 88.—*Spangenberg*, Einl. p. 425.—*Savigny*, R. R. im M. A. Vol. 3. p. 410 seqq.—*Brunquell*, Hist. jur. P. II. cap. 5. § 1.

Florentina s. litera Pisana, that is, those readings which are found in the Florentine manuscript;[a] or, 2. the *lectio vulgata s. Bononiensis*, that is, the revised text which the glossators derived from the Florentine manuscript and other original copies of the Pandects, by critical examinations and selection, and which was thereafter referred to in all the later manuscripts;[b] or, 3. a *lectio mixta*, that is, a text formed by a critical selection from the Florentine and the vulgate readings. A highly celebrated edition of the last kind is the Haloandrian, published by Gregorius Haloander, at Nuremberg, in 1529, in 3 vols. 4to.; whence its text is sometimes called the *lectio Norica*. Haloander used for this edition not the Florentine manuscript itself, but Polizian's and Bolognini's collations of it.[c]

Division of the Pandects into three parts.

§ 100. A very old division of the Pandects, which originated in the time of the glossators, and has been followed in almost all the manuscripts and editions of them, from that period down to the early part of the sixteenth century, is that into three parts or volumes; the first of which was called Digestum Vetus, the second Infortiatum, and the third Digestum Novum. The *Digestum Vetus*, or the first (oldest) part of the Pandects, embraced Lib. 1. to Lib. 24. Tit. 2; the *Digestum Novum*, or the last part of the Pandects, originally commenced with the words "*tres partes*" in Fr. 82. Dig. 35. 2., and extended to the end of the Pandects. The glossators at Bologna had at first only these two parts; but when they afterwards received the middle or second part,[d] they separated from the Digestum Novum the beginning it had then, as far as the end of the 38th book, and added it, as the coherence of the subjects treated therein required, to the second part of the Pandects. From this enlargement the second part received the name *Infortiatum* (it is never called *Digestum Infortiatum*). From that time the Infortia-

(*a*) No edition contains the pure Florentine text, not even that of Torelli; but most of it has been embodied in the editions of *Russard* (Lyons, 1521), of *Pacius* (Geneva, 1580, fol.), of *Charondas* (Antwerp, 1575, fol.), of *Contius* (Lyons, 1571. 1581.), and in the *Gebauer-Spangenberg* edition (Gottingen, 1776, 4to.). Concerning these several editions see *Thibaut*, l. c.; and with regard to the older editions, *Schrader*, Abh. aus d. Civ. R. Vol. 1. p. 257. Idem, Civ. Abh. p. 363.

(*b*) *Savigny*, l. c. Vol. 2. p. 147. Vol. 3. p. 424–449.—*Cramer*, Tit. Pand. & Cod. de verborum significatione. Kiel, 1811. in the preface, p. 13 seq.—*Clossius*, Descriptio codicum quorumdam manuscriptorum Dig. vet.; with a preface by Schrader. Weimar, 1818. See the preface and p. 271.—*Schrader*, Tit. D. de condict. ob turpem causam et de testibus. Tubingen, 1819, pref. p. 24.—The lectio vulgata may be found in all editions earlier than Polizian's and Bolognini's collations. The later editions contain a mixed text. *Thibaut*, Vers. Vol. 1. p. 293.

(*c*) Gothofred's editions, which were for a long time erroneously supposed to be editiones vulgatæ, are mixed editions, and follow principally the Florentine manuscript.

(*d*) This part was never entirely lost in Italy, as many have supposed from the fact that it was not originally found by the glossators at *Bologna*. See *Bartolus* in rubr. tit. D. soluto matrimonio (with which the *Infortiatum* commences), where he says "hoc volumen (Infortiatum) nunquam fuit amissum. Semper enim fuit totum volumen Pandectarum *Pisis*, et adhuc est."

tum contained therefore Lib. 24. Tit. 3. to Lib. 38, inclusive; and the *Digestum Novum* extended from Lib. 39. to the end of the Pandects.[a]

III. The Code.

§ 101. Many manuscripts of the *Code* are still preserved, but none of them equals, in celebrity and completeness, the Florentine copy of the Pandects. During the empire of the German tribes in Italy, the manuscripts of the Code, as they were used at that time only for practical purposes, were greatly mutilated. The three last books were entirely excluded; because, as they related chiefly to public law, they were considered as inapplicable to Italy: and in the first nine books many single constitutions were omitted.[b] It was for this reason that lectures were delivered only on the nine first books, and that they alone were contained in the older printed editions; in later times, however, the three last books, separated from the nine first, were taken into the *volumen parvum* (§ 104). Among the editions of the Code which deserve to be particularly noticed, are the *editio Haloandrina* by Gregorius Haloander, 1530, fol.; the edition of Contius (Paris, 1562, fol.); that of Russard (Antwerp, 1567, fol.); and that of Charondas (Antwerp, 1575, fol.).[c] In the Gebauer-Spangenberg edition of the Corpus Juris, there are noticed, besides the readings of the four last-mentioned editors, also those of the Gottingen manuscript of the Code.[d]

IV. Novels.

§ 102. The editions of the *Novels* differ from each other much more than those of any other part of the Corpus Juris. This is explained by the fact that the Novels did not form a body, that they had no intrinsic coherence, and that it was not till after the lapse of a long time that many of them were discovered and embodied in the editions.[e] The various editions of the Novels do not well admit of classification; and hence we can only indicate the characteristic features of each.[f] The following deserve particular notice:

(*a*) An historical account of this division of the Pandects is given by *Odofredus* in Dig. vetus, L. *jus civile* 6. de just. et jure; in Infortiatum, initio, and L. 82. ad L. Falc. verb. *tres partes*; in Dig. novum, initio.—*Heynii*, Opuscula academica, Vol. 2d, p. 315.—*Spangenberg*, Einl. p. 117.—*Eichhorn*, R. G. Vol. 2. § 267. note *g*.—*Hugo*, Civ. Mag. Vol. 3. p. 183. Vol. 4. p. 85. Vol. 5. p. 1. 475. Vol. 6. p. 34.—*Hugo*, Encycl. p. 244.—*Savigny*, R. R. im M. A. Vol. 3. p. 390. Vol. 4. p. 482. Vol. 6. p. 449.—*Puchta* in Schunck's Jahrb. Vol. 7. p. 129.—*Kaulen* de origine partitionis Digestorum, Gottingen, 1839.—*Stephan* de origine partitionis Digestorum, &c. Gottingen, 1839.

(*b*) See *Eckhardt*, Hermen. juris. Edited by Walch, p. 155.—*Schrader*, Abh. aus d. Civ. R. Vol. 1. p. 287.—*Spangenberg*, Einl. p. 547.

(*c*) *Spangenberg*, Einl. p. 128.—*Savigny*, R. R. im M. A. Vol. 3. p. 449.—*Niebuhr* in the Z. f. gesch. R. W. Vol. 3. p. 389.

(*d*) Concerning the old editions, see *Schrader*, l. c. p. 304. and in his Civ. Abh. p. 443.—*Spangenberg*, Einl. p. 463. See *Witte* in his work on the leges restitutæ of the Code. Breslau, 1830. See also the Rhein. Mus. Vol. 5. p. 121. and above, § 70.

(*e*) About the existing manuscripts of the Novels see *Eckhardt*, Hermen. jus. p. 161.—*Spangenberg*, Einl. p. 561.—*Biener* in the Z. f. gesch. R. W. Vol. 5. p. 338.

(*f*) See *Thibaut*, Vers. Vol. 1. No. 14.—

1. The first printed edition of the Novels. Rome, 1476, fol., which contains the old collection of the glossators, consisting of 97 Novels (*versio vulgata*).

2. The first critical Greek edition with a new Latin version, is that of *Gregorius Haloander*, at Nuremberg, 1531. fol. Soon after, another edition was published at Basle, 1541. fol.; the Greek text of which is founded on that of Haloander, but contains many arbitrary emendations. In its Latin text the *versio Haloandrina* and the *vulgata* are put side by side.

3. The edition of *H. Scrimger*, published at Geneva, 1558, which furnished only the Greek text, contains 25 Novels more than Haloander's; but on the other hand, it omits four which were comprised in the latter. A Latin translation of the Greek text of the Novels omitted by Haloander, and published by Scrimger, was furnished by *H. Agylæus*, Cologne, 1560; reprinted at Basle in 1561. The following are much more complete than those which have been mentioned:

4. The editions of *Contius*, containing the Greek and Latin text, with a new arrangement in the order of the Novels, published at Lyons, 1559, 1566, 1571. The edition of 1566 was reprinted at Lyons, 1581. The Latin text of Contius was afterwards embodied in Gothofred's edition.

5. That of *Simon Van Leeuwen* (in his edition of Gothofred's Corpus Juris Civilis, Amsterdam, 1663, fol.), which contains also the Greek text. *Hombergk zu Vach* founded his new Latin translation (published at Marburg 1717, in 4to.) upon this edition of Van Leeuwen.

6. That of *Gebauer* and *Spangenberg* (contained in their edition of the Corpus Juris), which is the latest and most complete edition of the Novels. It contains, besides the texts to be found in Van Leeuwen's edition, the entire translation of Hombergk with its supplements and most important various readings.

7. Lastly, two Novels (Nov. 62 and 104) have been edited for the first time in a complete state by *Savigny*;[a] a constitution of Justinian, wholly unknown before, has been published from a Vienna manuscript by *Biener*,[b] and the Novel 87 has been completed by *C. J. A. Kriegel* from Venitian, Florentine, and Vienna manuscripts.[c]

Appendices to the Corpus Juris Civilis.

§ 103. Besides Justinian's collections, there are in most of the edi-

Spangenberg, Einleitung, p. 470.—*Biener*, Geschichte der Novellen. Berlin, 1824. p. 317 seqq.—*Cramer*, Analecta lit. ad histor. Novellarum Justiniani. Kiel, 1794.—Idem in Hugo's Civ. Mag. Vol. 3.—*Weis*, Historia Novellarum literaria. Part 1. Marburg, 1800. *Savigny*. R. R. im M. A. Vol. 3. p. 453.

(*a*) *Savigny* in the Z. f. gesch. R. W. Vol. 2. p. 100.

(*b*) *Biener* in the same periodical. Vol. 5. p. 338. See also *Schrader* in the Tüb. krit. Z. Vol. 1. p. 118.

(*c*) *Kriegel*, Symbolæ criticæ ad Novellas Justiniani. Leipsic, 1832.

tions of the Corpus Juris Civilis several appendices to be found; some of which were introduced by the glossators, and others by later editors. They contain:

1. The 13 Edicts of Justinian, which, properly speaking, are Novels (§ 71, note *g*), and which might have been embodied in the collection of the Novels with more propriety than many of the Novels of Justinian's successors and eparchs.

2. Five constitutions of Justin the younger.

3. Four constitutions of Tiberius the younger.

4. Some other constitutions of Justinian,[a] Justin, and Tiberius.

5. The 113 Novels of the emperor Leo (§ 76).

6. A constitution of Zeno *de novis operibus*.

7. Several constitutions of different emperors, under the title *Imperatoriæ Constitutiones*.

8. *Canones sanctorum et venerandorum Apostolorum*.

9. The *Libri Feudorum*,* a collection of Lombardian feudal law and customs and German feudal laws of the twelfth century, which still continues to form the chief source of the feudal law of Germany.[b]

10. Some constitutions of Frederick II., from which the *Authenticæ Fridericianæ* were inserted into the Code (§ 81).

(*a*) The most remarkable among them is the Sanctio pragmatica, *Pro petitione Vigilii* (see above, § 78).

(*b*) *Eichhorn*, R. G. Vol. 2. § 278.—Pætz de origine librorum feudorum. Gottingen, 1805.—*Dieck*, Literärgeschichte des Longobard. Lehnrechts. Halle, 1828. (Reviewed by *Hugo* in the Gött. gel. Anz. 1828 No. 146. and by *Biener* in the Tüb. krit. Z. Vol. 5. p. 167.—*Laspeyres*, Ueber die Entstehung der Libri Feudorum. (On the Origin of the Libri Feudorum.) Berlin, 1830. (Reviewed by *Hugo* in the Gött. gel. Anz. 1830. No. 65.) —*Eichhorn*, loc. cit.

* The Consuetudines or Libri Feudorum (originally a private collection), were compiled about the middle of the twelfth century, at Milan. The sources from which this collection was composed were a number of treatises, judgments, documents, and other writings of the eleventh and twelfth centuries, on subjects of the feudal law of Lombardy. The glossators lectured and commented on this compilation, and Accursius made it a subject of his *glossa ordinaria*. According to Odofredus, it received its present shape from Ugolinus de Presbyteri. In the Corpus Juris glossatum it was appended to the Novels as a tenth Collation, and was thus introduced, together with the Roman law, into the various countries of Europe. In Germany, in particular, it acquired the force of a subsidiary law at the same time and in the same manner as the Roman and canon laws. The method formerly pursued in lecturing on the Libri Feudorum, was similar to that followed in the study of the Roman law; but in later times, the systematic method was applied to the feudal law also, and the latter was considered even as an independent branch of legal science. Though, during the last fifty years, various attempts have been made by European governments to relieve property from the burdens of feudalism, yet in most countries the *private* relations which originated under the feudal system still remain.

The Libri Feudorum is usually divided into two books, and these again into titles. In citing, the number of the book is placed first, then the word *Feud.*, and after it the number of the title; thus, for instance:

I. Feud. 28. II. Feud. 58.

The later additions appended to the Libri Feudorum, open with the 59th title of the second book, and are called *capitula extraordinaria*.

11. Two constitutions of Henry VII. (*Extravagantes*) on the *crimen læsæ majestatis* and rebellion, of the year 1312.

12. The *Liber de pace Constantiæ*, which contains the treaty of peace which the emperor Frederick I. made with the allied municipal towns of Lombardy.

Besides the above, several editions (for instance that of *Van Leeuwen*) comprise also the fragments of the Twelve Tables, of the Prætorian Edict, and of several Roman jurists, especially of Ulpian, Paulus, and Gaius; but only a small part of these are genuine. In the edition of *Baudoza* (Lyons, 1593. P. IV. p. 935), even the Golden Bull of Charles IV. has been embodied.

Editions of the whole Corpus Juris.

§ 104. The editions of the whole Corpus Juris Civilis may be divided into the glossed and the non-glossed.[a]

I. Glossed.

The *glossed* editions generally consist of five volumes. The first contains the *Digestum vetus;* the second, the *Infortiatium:* the third, the *Digestum novum* (§100)*;* the fourth embraces the first nine books of the Code; and the fifth, which generally has the title *Volumen legum parvum*, but is often simply called *Volumen*, contains the three last books of the Code, the Novels, the *Libri Feudorum*, and the Institutes.[b]

The most celebrated of the glossed editions are the following:

1. That published at Lyons by the brothers *Senneton*, 1549, 1550, in 5 Vols. fol.

2. That of *Ant. Contius*, at Paris, 1576, in 5 Vols. fol.

3. The *Corpus Juris Civilis Glossatum ex recensione Dionysii Gothofredi*, first published at Lyons, 1589, in 6 Vols. fol., without the title *Corpus Juris*, &c.; but afterwards with that title, in 1604; and finally, enlarged and improved, in 1612.

4. The one edited *studio et opera Johannis Fehii*, at Lyons, 1627; also in 6 Vols. fol.[c]

II. The Non-Glossed.

§ 105. The *non-glossed* editions are subdivided into those which contain *explanatory notes* of later jurists, and those which contain only the *text*, with or without the various readings.

A. The best editions with notes are the following:

1. That of *L. Russard*, under the title, *Jus Civile*. Lyons, 1560, '61,

(*a*) *Sammet*, Hermeneutik § 12. *Spangenberg*, Einl. p. 645 seqq.
(*b*) *Spangenberg*, Einl. p. 127.
(*c*) The edition of Baudoza. Lyons, 1593. (or in some copies: Geneva, 1593.) and 1600, is sometimes, but very undeservedly, classed among the better glossed editions. *Hugo*, R. G. s. J. p. 316. and Civ. Mag. Vol. 3. p. 129.

in 2 Vols. fol. Afterwards at Antwerp, 1566, '67; and again, ibid. 1569, '70, in 7 Vols. 8vo.[a]

2. That of *Contius*. Paris, 1562, in 9 Vols. 8vo.; Lyons, 1571, 15 Vols. 12mo.; and again, in 1581.[b]

3. That of *Charondas*. Antwerp, 1575, in two Vols. fol. containing a selection of the notes of Russard and Contius.

4. That of *Pacius*, Geneva, 1580. fol., same place and year, in 9 Vols. 8vo.

5. That of *Dionysius Gothofredus*.[c] Lyons, 1583, 4to.; reprinted, Frankfort, 1587.[d] 2nd edition improved, 1590, in 2 Vols. fol.; 3rd edition with further improvements, Geneva, 1602. 4 Vols. fol.; 4th edition, Lyons, 1607. 2 Vols. fol.; Geneva, 1614. 4to.; ibid. 1615. fol. The fifth and most complete edition with the notes of Dionysius Gothofredus, was edited by his son, Jacob Gothofredus. Geneva, 1624. fol. This has been frequently published since; and among the different editions we may in particular mention that of *Antonius*. Lyons, 1652 and 1662. 4to.

6. One of the best and most elegant editions, with notes, is that which was prepared by *Simon Van Leeuwen* from the last edition of Gothofredus. Amsterdam, 1663. fol. It contains, besides Gothofredus's notes, the annotations of many others, and has been reprinted, Frankfort, 1663. Leipsic, 1705, 1720, and 1740, in 2 Vols. 4to.[e]

B. The most important editions without explanatory notes, are:

1. The republication of the Haloandrian text. Basle, 1541. fol.; reprinted at the same place, 1570, in 3 Vols. fol.

2. The Amsterdam edition printed by Elzevir in 1664, with the well known error in the heading of the fifth book of the Pandects: "*pars secundus*." The later editions are those of 1681, 1687; and the most correct that of 1700. 8vo.

3. The Corpus Juris Academicum, by *Freiesleben*, Altenburg, 1721, Basle, 1734; and many editions since, at each of those places. The Altenburg editions contain merely the text. The Basle editions give also parallel passages.

4. The critical edition commenced by *G. C. Gebauer*, and completed

(*a*) *Russard* in his edition has included many passages, between the marks ‖ ‖, to show that they were not contained in all the manuscripts.—*Spangenberg*, Einl. p. 442.

(*b*) In this edition only the Institutes and Code were published by Contius. *Spangenberg*, Einl. p. 809.

(*c*) The selection of the text is very bad, and the notes are full of useless repetitions, and of objections (*immo*) taken from passages apparently contradictory, without any attempts to reconcile them. See *Struve's* Gothofredi immo. Frankfort, 1695. Nevertheless Gothofred's editions are valuable for the many parallel passages and extracts from the best jurists, which they contain, and on account of their references to the Basilics, &c. Gothofred's editions *without notes*, are of little value.—*Gebauer*. Narratio de Brenckmanno. Gottingen, 1764, § 29–35. —*Thibaut*, Vers. Vol. 1. No. 14.

(*d*) The Frankfort reprint of 1663, in quarto, distinguished by four joined hands on its title-page, does not deserve the praise which is so generally bestowed upon it.

(*e*) The reprint of 1740 is much approved of.

after his death by *G. A. Spangenberg*. Gottingen. 1st Vol. 1776; 2d Vol. 1797. 4to. It contains many various readings and critical notes.[c]

Much has been done of late to furnish good critical editions with explanatory notes. Schrader was the first to show the way and give directions how to accomplish this.[b] He has himself, with the assistance of Clossius, Tafel, and Maier, long since commenced the publication of an edition of this description. The first volume, containing the Institutes, has already appeared.[c]

Besides this great undertaking of Schrader, several smaller editions of the Corpus Juris Civilis have since been published at Leipsic, which merely contain the text and the most important various readings; among which those of Beck[d] and of the Kriegel brothers[e] are the best. The Kriegel brothers, in their notes on the Institutes, refer to the Institutes of Gaius, to Ulpian, and to the Basilics; and their notes upon the Pandects contain abundant references to the three branches of the Fragments and their arrangement (§ 63), to the Partes Digestorum (§ 65), and to the Basilics and the scholia on them throughout. It may also be mentioned that a German translation of the Corpus Juris Civilis has been published under the superintendence of Otto, Schilling, and Sintenis.[f]

Editiones reconcinnatæ and Chrestomaties.

§ 106. Besides the editions of the Corpus Juris already enumerated, there are others called *editiones reconcinnatæ*, i. e. those in which the text of the Fragments and Constitutions has been arranged by the editors in a systematic order, chosen by them for the purpose of exhibiting in connexion all the scattered passages on the same subject. To these belong:

1. *Eusebii Begeri Corpus Juris Civilis reconcinnatum, in tres partes distributum, cum præf. L. B. De Senckenberg.* Frankfort and Leipsic, 1767, 1768, in 3 Vols. 4to.

2. *Pothier, Pandectæ Justinianeæ in novum ordinem digestæ, cum legibus Codicis et Novellis*, &c. Paris, 1748–52. Afterwards at Lyons, 1782, in 3 Vols. fol.; and again at Paris, 1818–21, in 3 Vols. fol.

(*a*) Gott. gel. Anz. 1797. p. 1065–1088.—Jen. Allg. Lit. Zeit. 1804. No. 19.—*Spangenberg*, Einl. p. 451.

(*b*) *Schrader*, Abh. aus d. Civ. R. Vol. 1. No. 6. Idem in *Hugo's* Civ. Mag. Vol. 4. No. 14. Idem l. c. (above p. 91, note *b*.)—*Wening*, in the Münch. Allg. Lit. Zeit. 1819. No. 13.

(*c*) Corpus Juris Civilis edited by *Schrader*, with the assistance of *Tafel*, *Clossius*, and *Maier*, Vol. 1. Institutes. Berlin, 1832. (Reviewed by *Hugo* in the Gött. gel. Anz. 1832. No. 170. 171.)

(*d*) Of *Beck's* edition (with notes) the first volume appeared in 1825 and 1826, in two parts, containing the Institutes and Pandects—the second volume in 1831 and 1836 containing the Code and Novels. The present Editor refers the reader to Beck's stereotype edition, without notes, published in 2 Vols. Leipsic, 1829 and 1837.

(*e*) Published at Leipsic from 1828 to 1837. 4to. Stereotyped. See concerning it, *Schrader* in the Tüb. krit. Z. Vol. 6. p. 41. *Elvers*, Allg. jurist. Zeit. 1830. p. 371.

(*f*) Leipsic, 1830 to 1833, in 7 Vols.

3. Chrestomathies, or selections of the more important passages from the sources of the Roman law, have been published by Domat,[a] Seidensticker,[b] Hugo,[c] Cropp,[d] Savigny,[e] Haubold,[f] Pernice,[g] Fürstenthal,[h] Hermann,[i] and Blondeau.[k]

(*a*) *Domat*, Legum delectus ex libris Digestorum et Codicis. Paris, 1700. 4to. Amsterdam, 1703. 4to. Also in his Lois civiles dans leur ordre naturel. Paris, 1713. 1723. 1745. 1756. 1767. 1777. The first edition appeared in 1687 (seven years before the author's death), in 1 Vol. 4to. The edition of 1723 much improved, was published in 2 Vols. with a supplement; that of 1777, by De Jouy, is the most valuable. (An English translation of Domat's Lois civiles was published by Dr. Strahan, with remarks on the material differences between the civil and English common law; under the title: The Civil Law in its natural order. London, 1722.)

(*b*) *Seidensticker*, Corpus juris civilis in Chrestomathiam contractum. Gottingen, 1798. 8vo.

(*c*) *Hugo*, Chrestomathie von Beweisstellen. (Selection of principal passages.) Berlin, 1802. 1807. 1820.

(*d*) *Cropp*, Loca juris Romani selecta. Heidelberg, 1815. 8vo.

(*e*) *Savigny*, Sammlung von Beweisstellen aus dem Corpus Juris. Berlin, 1822.

(*f*) *Haubold*, Doctrinæ Pandectarum lineamenta cum locis classicis juris imprimis Justinianei, &c. Leipsic, 1820. 8vo.

(*g*) *Pernice*, Grundriss der Geschichte, Alterthümer und Institutionen des Römischen Rechts. (Outlines of the history, antiquities, and institutes of the Roman law.) 2d Edition, Halle, 1824. 8vo.

(*h*) *Fürstenthal*, Chrestomathie von Beweisstellen zu Thibaut's System. 2 Vols. Berlin, 1828 and 1829. and zu *Wening's* Lehrbuch. 1 Vol. Berlin, 1829. (Chrestomathies containing the principal passages cited in *Thibaut* and *Wening's* works on the Pandects.)

(*i*) *Hermann*, Sammlung von Beweisstellen zu Mackeldey's Compendium. 2 Vols. Giessen, 1832.

(*k*) *Blondeau*, Chrestomathie, ou choix de textes pour un cours élémentaire du droit privé des Romains. 4 Nos. 1830 and 1833.

SIXTH DIVISION.

METHODS OF TEACHING, AND LITERATURE OF THE ROMAN LAW.

In General.

§ 107. The positive law may be treated in three different methods—exegetically, dogmatically, or historically. Each of these methods has a value and advantages of its own, and each needs more or less the assistance of the others. *Exegesis* forms the first and principal basis for the scientific treatment of positive law; *dogmatics* exhibit the law as it actually exists, in its whole extent and practical applicability; and *legal history* presents the historical and political reasons for the actual law, and thus enables us to ascertain its true meaning and spirit. Exegesis, dogmatics, and legal history, ought therefore always to be united to each other; although, according to the special purpose for which the author labours in his writings, or the professor in his lectures, one or the other of them may be considered as the primary or main object; and it is only in this respect that the distinction usually made between exegetical, dogmatical, and historical writings and lectures, is of any importance or significancy.[a]

Method of the Glossators.

§ 108. The glossators pursued, in their writings as well as their lectures on the Roman law, the exegetical method chiefly. They illustrated the text of Justinian's collections, which formed the foundation of their writings and lectures, partly by brief summaries of the contents of the several titles (*summæ*); and partly by explanatory annotations on single passages (*glossæ*), which were sometimes also called *apparatus* when they extended in the manner of a running commentary over a whole title.[b] This method continued to be followed for a long time afterwards in Italy and France, as well as in Germany, when, after the introduction of the Roman law,* it became the subject of instruction in the universities.

Later Methods.

§ 109. But when, in course of time, lectures on several other branches of legal science were introduced, the attention given to the exegesis

(*a*) With regard to the various methods of teaching the Roman law, see *Haubold*, Inst. jur. dogm. Edited by Otto. § 22–34.—*Falck*, Encyclopädie. 3d Ed. p. 177 seqq.—*Seuffert*, Erört. P. 1. No. 1. and the works cited above, § 18. note *b*.

(*b*) *Spangenberg*, Einl. p. 255.—*Savigny* R. R. im M. A. Vol. 3. p. 497.523. Vol. 4 and 5.

* In the earlier times, when casuistry was still in vogue, and the art of systematizing and generalizing the science of law was but little known, the *legal* method was doubtless the most proper to be pursued. More recently, however, a great change has

of the Roman law was necessarily diminished, and the limits of the study were contracted. On this account, in the 16th and 17th centuries, compendiums of the Pandects, and afterwards even of the Institutes, were written, which prepared the way for the dogmatical method of instruction. In all compendiums of the Roman law thus published, the order of the titles of the Institutes and Pandects (the so-called legal arrangement, *secundum ordinem Institutionum* or *Digestorum*) was at first observed; and according to this order the lectures were for a long time delivered in the German universities.[a] Almost all the modern compendiums of the Institutes and Pandects, however, follow the systematic order chosen by their authors; but at the same time they differ greatly from each other in their plan and contents. The history of the Roman law is at present sometimes joined to works and lectures on the Institutes, and sometimes treated separately.

Importance of Exegetical Study.

§ 110. In Germany, at the present time, the historico-dogmatical lectures on the Roman law are the most common and most popular. They are undoubtedly the best adapted to the first study of the law; but it is to be regretted that this should, as it actually does, occasion a neglect of the exegetical lectures on the sources themselves. Nothing can be more desirable than the introduction to a greater extent of exegetical lectures on the text of the Institutes, and on select passages of other parts of the Corpus Juris, and likewise on Ulpian, Gaius, and the Vatican Fragments.[b] The only way of obtaining a sound educa-

(*a*) *Hugo*, Encycl. 7th edition, p. 341–354.—*Falck*, Encycl. 3d edition. § 91. The Institutes, following the plan adopted by Gaius, are founded on the principal division into *jus personarum* and *jus rerum*; the *obligationes* were included in the jus rerum, and the practical part, or *actiones*, were appended to the whole. The Pandects pursuing the opposite method, begin with the practical (the single *actiones*) and close with the theoretical part. The modern writers (among them Mackeldey) have established an entirely different system.

(*b*) *Hugo*, Civ. Mag. Vol. 2. p. 251. Vol. 4. 237.—*Schrader*, ibid. Vol. 4. p. 411.—*Falck*, l. c. p. 182.

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taken place in this respect: the science has attained a far higher degree of development; and the academical study of the law has been greatly extended. The fact that the modern jurist is obliged to give his attention to so many other objects, was an additional reason for the abandonment of the legal arrangement, in order to abridge the study of the Roman law by a more systematic exhibition of its principles and provisions. The following are the branches of legal science which, at the present day, are made the subjects of special lectures in all the German universities: I. The course of legal study. II. Private law, which is divided into: 1. *Roman*, with respect to which lectures are delivered for beginners on its history and the law of the Institutes; while the complete details of the Roman private law are reserved for the so-called lectures on the law of the Pandects; and, 2. *German*, which includes the laws of exchange, trade, and commerce, and also the feudal law. (See note * to § 94.) The history of the German empire and its laws (external legal history) is taught separately. III. Theory of the German civil proceedings. Practical exercises in drawing up forms, judgments, decrees, &c. are usually reserved for a separate course of lectures, called the *Civil-practicum*. IV. Criminal

tion in the legal as well as in the other sciences, is by a thorough study of the sources, which enables us to depend upon ourselves instead of blindly following others.

LITERATURE OF THE ROMAN LAW.

§ 111. We have already spoken at different times in the course of this work, especially in the Fifth Division, of the sources of the Roman law which have been preserved. It only remains now that we should mention the principal works belonging to its literature.

I. Bibliographical Works.

Martini Lipenii Bibliotheca realis juridica. Frankfort, 1672. fol. post Struvii et Jenichenii curas multis accessionibus aucta. Vol. I. and II. Leipsic, 1757. fol. Supplements to it have been published: 1. to the 1st Vol. by F. A. Schott, ibid. 1775. fol.; 2. to the 2d Vol. by R. C. de Senckenberg, ibid. 1789. fol.; 3. to the 3d, 4th, and 5th Vols. by L. G. Madihn, Breslau, 1817–1830. fol.

B. G. Struvii Bibliotheca Juris selecta. Jena, 1703. The eighth edition by Buder. Jena, 1756. 8vo.

Camus, Bibliothèque choisie des Livres de Droit; appended to his Lettres sur la profession d'Avocat. Paris, 1772. 1775. 4th edition by *Dupin*. Paris, 1818. 8vo.

C. Chr. Westphal, Systematische Anleitung zur Kenntniss der besten Bücher in der Rechtsgelahrtheit. (Systematic Survey of the best Law Books.) 3d edition. Leipsic, 1791. 8vo.

Heinrich J. O. König, Lehrbuch der allgemeinen juristischen Literatur (Compendium of Legal Literature); especially the second volume. Halle, 1785. in 2 Vols. 8vo.

J. S. Ersch, Literatur der Jurisprudenz und Politik; edited by Koppe. Leipsic, 1823. 8vo.

Von Ulmenstein, Bibliotheca selecta Juris Civilis. Berlin, 1822–23, in 4 Vols.

Comp. also *Hugo*, Geschichte des Römischen Rechts seit Justinian. (History of the Roman Law since Justinian.) 3d edition. p. 58 and 59.

II. Lexicographical Works.

B. Brissonius de Verborum quæ ad Jus Civile pertinent Significatione. First edition. Lyons, 1559. fol. There have been many editions since, the last by J. G. Heineccius, with a preface by J. H. Böhmer. Halle, 1743. fol.

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law and criminal proceedings. In many universities, the theory of criminal practice is also taught; and these lectures, called the *Criminal-practicum*, serve to make the students familiar with the forms used in indicting, defending, and sentencing criminals. V. Ecclesiastical law. VI. Natural law. VII. Law of nations and German political law. Besides those enumerated, in the universities of the different states there are special lectures devoted to their own civil, criminal, ecclesiastical, and political law. Of late, and certainly with reason, the jurist is also required to have pursued academical studies in the science of government, which is now taught in most of the German universities in all its different branches. But the study of the Roman law, or, as it is commonly called, the "study of the Pandects," is very justly regarded on all hands as constituting pre-eminently the basis of a sound legal education; for certainly nothing can be better suited to form and develope a legal mind and prepare the student for the mastery of all the other branches of the law, or to fit him for any public office or employment wherewith he may be intrusted.

J. Wunderlich, Additamentorum ad B. Brissonii opus de Verborum Significatione volumen. Hamburg, 1778. fol.

Andr. G. Crameri Supplementi ad Brissonii opus de Verborum Significatione specimen 1. Kiel, 1813. 4to.

R. P. Vicat, Vocabularium juris utriusque. Lausanne, 1759. 3 Vols. 8vo. Naples, 1760. 4 Vols. 8vo. (Extracted from Brissonius).

With regard to Brissonius and the later editions and enlargements of his work see:

H. E. Dirksen, in the Rheinische Museum für Jurisprudenz. Vol. 2. p. 82. and in his System der Juristischen Lexicographie. Leipsic, 1834. p. 30 et seqq.

Dirksen, Specimen Thesauri latinitatis fontium Juris Civilis Romanorum. Leipsic, 1834.

Idem, Manuale latinitatis fontium Juris Civilis Romanorum, Thesauri latinitatis epitome; nine numbers. Berlin, 1837–1839.

III. Hermeneutical Works.

Val. G. Forsteri Interpres, sive de interpretatione Juris. Wittenberg, 1613. Altenburg, 1710. and in E. Otto's Thesaurus Juris Rom. Vol. 2. p. 947–1068.

F. Rapolla de Icto, sive de ratione discendi interpretandique Juris Civilis. Naples, 1726. 8vo. 2d edition. ibid, 1766. Translated into German with notes by Griesinger. Stuttgart, 1792. 8vo.

Ch. H. Eckhardt, Hermeneutica Juris. Leipsic, 1750. 2d edition with notes by C. F. Walch, 1779; 3d edition with notes by C. W. Walch, 1802. 8vo.

H. G. Wittich, Principia et subsidia Hermeneuticæ Juris. Gottingen, 1799. 8vo.

J. G. Sammet, Hermeneutik des Rechts, edited by Born. Leipsic, 1801. 8vo.

Thibaut, Theorie der logischen Auslegung des Römischen Rechts (Principles of logical Interpretation of the Roman Law). Altona, 1799. 2d edition, 1806. 8vo.

W. F. Clossius, Hermeneutik des Römischen Rechts und Einleitung in das Corpus Juris Civilis im Grundrisse, mit einer Chrestomathie von Quellen. (Hermeneutics of the Roman Law and Introduction to the Corpus Juris Civilis, with select extracts.) Riga and Dorpat, 1829. 8vo.

IV. Exegetical Works.

A. On the whole Corpus Juris.

To this class belong chiefly, the Glossa Accursiana (§§ 80. 104); the notes of later jurists, especially of *Dionysius Gothofredus* to his edition of the Corpus Juris (§ 105); and properly all the works of *Cujas*, which contain the most valuable exegetical observations on almost all the difficult passages of the Corpus Juris. The most complete editions of his works are the following:

J. Cujacii Opera omnia. Edited by A. Fabrot. Paris, 1658. 10 Vols. fol.

J. Cujacii Opera omnia, studio et diligentia Liborii Ranii. Naples, 1722–1727. 11 Vols. fol. 2d edition by D. Albanensis. ibid. 1757 or 1758.

J. Cujacii Opera omnia. Venice and Modena, 1758–1783. in 11 Vols. fol. (This is a mere reprint of the Naples edition, differing only in the number of pages.) Another reprint is now coming out at Munich.

The following book is indispensable to a complete use of Cujas's works:

D. Albanensis Promptuarium universorum Operum Jac. Cujacii. 2 Vols. fol. It exhibits connectedly the various illustrations of Cujas on Justinian's and other law sources. The original edition was published at Naples, 1763, and is adapted only to the two Naples editions of Cujas's works. A reprint of this Promptuary appeared at Modena, in 1795, which was arranged to agree with the Venice and Modena edition of Cujas, and is therefore suitable for that edition alone. (See respecting this, *Thibaut*, Civilistische Abhandlungen. p. 248.—*Hugo*, Civilistisches Magazin. Vol. 6. p. 189.—*Thibaut* in the Archiv für Civilistische Praxis. Vol. 13. p. 193. 452.)

On Single Parts.

1. Institutes.

Fr. Balduini Commentarius ad Instituta. Paris, 1564. fol. ibid. 1554. Frankfort, 1582. fol.

Jac. Cujacii Notæ priores et posteriores in Institutiones. Cologne, 1592, and in Ranius's edition of Cujas. Vol. 1. p. 1.

Fr. Hotomani Commentarius in Institutiones. Basle, 1560. fol. ibid. 1659. Lyons, 1588. Also in his works. Vol. 2. p. 1.

Jani a Costa, Commentarius. Paris, 1659. 4to, with Theod. Marcellius and M. A. Muretus's Commentaries, edited by J. Van de Water. Utrecht, 1714. 4to. Leyden, 1719 and 1744. 4to.

H. Vulteii Commentarius. Marburg, 1598. 4to. ibid. 1600. ibid. 1613.

Paul. Voetii Commentarius in IV libros Institutionum in 2 parts. Utrecht, 1668. 4to.

Edm. Merillii Commentarius in IV libros Institutionum; opera et studio Claudii Mongin. Paris, 1654. 4to.

Arnoldi Vinnii Commentarius. Amsterdam, 1642. 4to, and many editions since, lastly with notes by Heineccius. Leyden, 1726. 4to. ibid, 1767.

J. Hoppii Commentatio succincta ad Institutiones. Frankfort, 1693. 4to. and many later editions; the last, ibid. 1746.

E. Ottonis Commentarius et Notæ criticæ ad Institutiones. Utrecht, 1729. 4to. with a preface by C. F. Harpprecht. Frankfort and Leipsic, 1743. 4to; afterwards edited by J. R. Iselinus. Basle, 1760.

Imperatoris Justiniani Institutionum libri IV. Commentario perpetuo instruxit *Ed. Schrader*. Berlin, 1832. 4to. (see § 105, note *c*. p. 97).

2. Pandects.

Odofredi Commentarii in Digesta. Venice, 1480. fol. Lyons, 1550. fol.

G. Budæi Annotationes in XXIV Pandectarum libros. Paris, 1508. fol. and many later editions; the last, Lyons, 1567. 8vo.

Andr. Alciati Commentarii in varios titulos Digestorum; in his works, Lyons, 1560. Vols. 1 and 2d.

E. Baronis Commentarii ad τὰ πρῶτα Digestorum. Paris, 1548. fol. in his works Vol. 1. and ad varios titulos Digestorum in the 2d Vol. p. 49.

F. Duareni Commentarii in varios Digestorum libros et titulos; in his works published at Frankfort, 1598. fol. p. 1. 1026.

J. Cujacii Commentarii in quosdam Pandect. titulos, in his works, edited by Ranius. Vol. 1. p. 893.—Recitationes solennes in Digesta, in his works. Vols. 7 and 8.—Notæ in Digesta, in his works. Vol. 10. p. 382.—Recitationes solennes ad nonnullos titulos Digestorum, in his works. Vol. 10. p. 1046.

Aug. Donelli Comment. in quosdam titulos Digestorum. Antwerp, 1582. fol. in his works, Vols. 10 and 11.

Fr. Hotomani Scholæ in LXX. tit. Dig. et Cod., in his works, Vol. 2d p. 1.

H. Giphanii Lecturæ Altorphinæ in varios titulos Dig. et Cod. Frankfort, 1605. 4to.

Ant. Fabri Rationalia in Pandectas (ad lib. 1–19). Vol. 1. Geneva, 1604. Ibid. 1619. Vols. 2–5. Ibid. 1619–1626. fol. Vols. 1–5. Lyons, 1659–1663. fol.

Ejusdem Conjecturæ Juris Civilis. Lyons, 1591–97. fol.; the last edition, Leyden, 1718. 4to.

J. Brunnemanni Comment. ad Pandectas. Frankfort on the Oder, 1670. fol. cura Sam. Strykii. Wittenberg, 1731. fol.

A. Mornacii Observationes in L libros Digestorum. Vols. 1 and 2. Paris, 1654–1660. fol.; in his works, Vols. 1–4. Ibid. 1721. fol.

Jani a Costa, Prælectiones ad illustriores quosdam titulos locaque selecta Juris Civilis. Leyden, 1773. 4to.

A. D. Alteserræ Recitationes quotidianæ in Claudii Tryphonini, libros XXI Disputationum et varias partes Dig. et Cod. 2 Vols. Toulouse, 1679–84. 4to.

3. Code.

Odofredi Lectura in XII libros Codicis. Lyons, 1550. fol.

Azonis Lectura s. Comment. ad sing. leg. XII libr. Cod. Justinianei. Paris, 1577. fol.

Andr. Alciati Adnotat. in tres posteriores libros Codicis; Commentar. in varios tit. Codicis; in his works. Lyons, 1560. Vols. 1. 4. 5.

J. Sichardi Prælectiones in Codicem. Vols. 1. 2. Basle, 1565. fol. Frankfort, 1586. ibid. 1614. fol.

J. Cujacii Comm. in tres postremos libros Codicis; in his works, edited by Ranius. Vol. 2d.—Recitationes solennes in Codicem; in his Works, Vol. 9th.—Notæ in Cod.; works, Vol. 10th p. 603–744. Recitationes solennes in libros IV priores Cod.; in works, Vol. 10th p. 813 seqq.

F. Hotomani Scholæ in LXX titulos Dig. et Cod.; in his works, Vol. 2d. p. 261.

H. Donelli Comm. in II. III. IV. VI. et VIII. libr. Cod. Frankfort, 1599. fol. ibid. 1620. Also in his works, Vols. 7–9.

H. Giphanii Explanatio difficiliorum et celebriorum legum Codicis. 1614. 4to. Basle, 1615. Frankfort, 1631.

A. Mornacii Observat. in libr. Cod. I. III. IV. Paris, 1620; and in his works Vols. 1–4.

Perez, Prælectiones in Codicem. Cologne, 1661. 2 Vols. 4to. and often since.

Jo. Brunnemanni Comment. in XII libr. Cod. Leipsic, 1679. ibid. 1699. fol.

P. et F. Pithœi Comm. ad Cod. Just. edited by F. Demarés. Paris, 1689. fol.

J. J. Wissenbachii Comm. in libros IV priores Cod. Franeq. 1660. 4to. in libr. V. VI. et VII. Ibid. 1664; the latest edition, ibid. 1701.

C. Regneri ab Oosterga, Comm. in omnes et singulas leges quæ continentur in Codice. Utrecht, 1666. 4to.

A. D. Alteserræ Recitationes quotidianæ in varias partes Dig. et Cod. Vols. 1. 2. Toulouse, 1679–84. 4to.

4. Novels.

F. Balduini Breves comment. in præc. Just. novellas sive Auth. Constit. Lyons, 1548. 4to.

J. Cujacii Expositio novell. Const. Just.; in his works, edition by Ranius. Vol. 2. p. 1017 seqq.

J. Stephani Expositiones novellar. Constit. Frankfort, 1608. 4to.

C. Ritterhusii Jus Justinianeum, h. e. Novellarum Justiniani expositio methodica. Strasburg, 1615. 4to. Ibid. 1629. Ibid. 1669.

The following works afford great assistance in referring to the illustrations of single passages of Justinian's law collections, which are scattered throughout the above mentioned, and other exegetical works.

C. F. Hommelii Corpus Juris Civilis cum not. varior. Leipsic, 1768. 8vo.

A. Schultingii Notæ ad Dig. cum animadversionibus *Nic. Smallenburgii*. Vols. I–VI. Vol. VII. P. I. 1804–1832. (The seven volumes refer to the seven partes Digestorum (§ 65) and the first Part of the seventh volume extends to Dig. 50. 15.)

For the exegetical writers see in general *E. Spangenberg*, Einleitung, p. 254–400.

V. Historical and Antiquarian Works.

A. On the Roman Constitution and Government.

Pauli Manutii Antiquitates Romanæ. The single treatises de Legibus, de Senatu, de Comitiis Romanorum, and de Civitate Romana, are contained in J. G. Grævii Thesaurus antiquitatum Romanarum. Vols. 1st and 2d.

Onuphrii Panvinii Reipublicæ Romanæ commentariorum libri III. Venice, 1558. 8vo; and afterwards enlarged. Paris, 1588. The single treatises are to be found in Grævii Thesaurus. Vol. 1. 3.

Francisci Hotomani Antiquitatum Romanarum libri V; in his works Vol. 3. p. 191–764. Also in Grævii Thesaurus. Vol. 2.

C. Sigonii de antiquo Jure populi Romani libri XI. The best edition of this valuable work is contained in his works. Milan, 1736. Vol. 5.

Em. Duni Origine et progressi del cittadino e del governo civile di Roma. in 2 Vols. Rome, 1763–64. 8vo. Translated into German, by W. Eisendecker. Hamburg, 1829. 8vo.

L. De Beaufort, La République Romaine, ou plan général de l'ancien gouvernement de Rome, in 2 Vols. 4to. Hague, 1766. Paris, 1767, in 6 Vols. 12mo. Hague, 1775. 8vo.

Barth. G. Niebuhr's Römische Geschichte. 2. Parts. Berlin, 1811. 1812. 8vo. A rewritten edition of the whole work has been published: of the 1st part the second edition appeared in 1827, and a 3d in 1828; of the 2d part, the second edition was published in 1830. (The following reviews relate to the first edition of the work: viz. that of A. W. Von Schlegel in the Heidelberger Jahrbücher of 1816. Nos. 53–56; W. Wachsmuth, die ältere Geschichte des Römischen Staats, Halle, 1819; and Elvers, über die Quellen der ältesten Römischen Staats- und Rechts-Geschichte, in his Beiträge zur Rechtslehre und Rechtswissenschaft p. 3.) Translations of the work are: The History of Rome by *B. G. Niebuhr*, translated by *J. C. Hare* and *C. Thirlwall*. Vols. 1 & 2. Cambridge 1828. 8vo. (See Edinburgh Review. July, 1830. p. 358.); and two editions since. *B. G. Niebuhr*, Histoire Romaine, traduite de l'allemand sur la 3me édition, par *B. A. de Golbéry*. Two Vols. Paris, 1829; and reprinted at Brussels, 1830. 8vo.—The 3d Vol. completed by the author himself has been published since his death, with a preface by Classen. Berlin, 1832. Translated into English by Drs. *W. Smith* and *L. Schmitz*. London, 1842. Dr. *Schmitz* has also edited in English Vols. 4 and 5, from short-hand notes of the author's Lectures. London, 1844.

C. F. Schulze, Von den Volksversammlungen der Römer. (On the Assemblies of the Roman people, or Comitia.)'Gotha, 1815. 8vo.

T. M. Zachariä, Versuch einer Geschichte des Römischen Rechts. (Essay on the history of Roman Law.) Leipsic, 1814. 8vo.—See on this topic the 1st and 2d divisions of that work.

C. D. Hüllmann, Staatsrecht des Alterthums. (Public Law of Antiquity.) Cologne, 1820. 8vo.; and especially his Römische Grundverfassung. (Roman Constitution.) Bonn, 1832. 8vo.

C. A. Gründler, Handbuch der Römischen Rechts-Geschichte. Bamberg, 1821. 8vo.

Bischoff, Römische Geschichte. Vol. 1. Leipsic, 1825. 8vo.

Hopfensack, Staatsrecht der Unterthanen der Römer. (Public Law of the Subjects of Rome.) Dusseldorf, 1829. 8vo.

Schultz, Grundlegung zu einer geschichtlichen Staatswissenschaft der Römer. (Foundation for a History of the Political Science of the Romans.) Cologne, 1838. 8vo.—A refutation of this has been attempted by *Klenze*, in his kritische Phantasieen eines praktischen Staatsmannes. Berlin, 1834. 8vo.

Göttling, Geschichte der Römischen Staatsverfassung. Halle, 1840.

P. von Kobbe, Römische Geschichte. 1 Vol. Leipsic, 1840.

C. Hoeck, Römische Geschichte. Brunswick, 1 Vol. 1841.

B. History of the Roman Law in particular.

1. External.

Aymari Rivallii Historiæ Juris Civilis libri V. Mayence, 1527. 8vo; and several times since.

Jac. Gothofredi Manuale Juris. It contains among other things a brief history on the law, and has often been republished. The best editions are those of Leyden, 1684. 12mo. Geneva, 1710. Paris, 1806. It is to be found also in his Opp. min., edited by Trotz, p. 1237.

G. Schubart de fatis Jurisprudentiæ Romanæ. Jena, 1696. Afterwards edited by C. G. Tilling. Leipsic, 1797. 8vo.

Ch. G. Hoffmann, Historia Juris Romani. Vol. 1. Leipsic, 1718. 1734. Vol. 2. Leipsic, 1726. 4to.

J. S. Brunquell, Historia Juris Romano-Germanici. Jena, 1727. 8vo; afterwards Amsterdam and Leyden, 1751. 8vo.

Ant. Terrasson, Histoire de la Jurisprudence Romaine. Paris, 1750. fol.

R. F. Telgman, Geschichte des Römischen Rechts. Salzwedel, 1739. 8vo; afterwards much enlarged and improved. Gottingen, 1736; latest edition by Scheidemantel. Leipsic, 1780. 8vo.

J. G. Heineccii Historia Juris Civilis Romani et Germanici. Halle, 1733. 8vo. Leyden, 1740.; with notes by Ritter, ibid. 1748; and with these edited by Silberrad, Strasburg, 1751 and 1765. 8vo.

J. A. Back, Historia Jurisprudentiæ Romanæ. Leipsic, 1754. 8vo. with annotations by A. C. Stockmann, sixth edition, 1806.

C. G. Haubold, Historia Juris Romani tabulis synopticis secundum Bachium concinnatis illustrata. Leipsic, 1790. 4to. A new edition of this work by Jourdan, with some alterations and additions appeared in Paris, 1823.

Th. M. Zachariä, Versuch einer Geschichte des Römischen Rechts. Leipsic, 1814. 8vo.—See on this topic the third division of that work.

C. C. Dabelow, Römische Staats- und Rechtsgeschichte im Grundrisse. (Outlines of the history of the Roman State and Laws.) Halle, 1818. 8vo.

Berriat Saint-Prix, Histoire du Droit Romain. Paris, 1821. 8vo.

Maciejowski, Historia Juris Romani. Warsaw, 1825. 8vo. 2d edition.

2. Internal Legal History and Antiquities.

Heineccii Antiquitatum Romanarum jurisprudentiam illustrantium syntagma, secundum ordinem Institutionum digestum. Halle, 1719. 8vo. Many editions have appeared since: The best are those by Cannegieter. Louvain, 1777. 8vo; by C. G. Haubold. Frankfort, 1822., and by C. F. Mühlenbruch. Frankfort, 1841.

Selchow, Elementa Antiquitatum Juris Romani publici & privati. Gottingen, 1757–8. Enlarged under the title, Elementa juris Romani Ante-Justinianei, Gottingen, 1778. 8vo.

For the study of the Antiquities of the Roman law the following auxiliary works may be used:

Sam. Pitisci Lexicon Antiquitatum Romanarum. 3 Vols. Hague. 1737. fol.

G. H. Nieupoort, Rituum qui olim apud Romanos obtinuerunt succincta explicatio. Utrecht, 1712. 8vo. Many later editions have been published; the latest, Leyden, 1802. A French translation of this work, with the title, Explication abrégée des coutûmes & cérémonies observées chez les Romains, par *Desfontaines*, appeared Paris, 1750. See also, *C. G. Schwarz*, Observationes ad Nieupoortii Compendium antiquitatum Romanarum, cum præf. A. M. Nagel. Altdorf, 1757. 8vo. *C. J. G. Haymann*, Anmerkungen über Nieupoort's Handbuch der Röm. Alterthümer. (Observations on Nieupoort's work.) Dresden, 1786. 8vo.

G. C. Maternus von Cilano, Römische Alterthümer. Edited by Adler. 4 Vols. Altona, 1775. 1776. 8vo.

Adam's Roman Antiquities, or an Account of the Manners and Customs of the Romans. Edinburgh, 1791. It has gone through many editions in Great Britain and in America; the last is by Dr. Boyd, London, 1840. 12mo. There have been several editions of a German translation with additions, by J. L. Meyer; and also of a translation in French.

Nitsch, Beschreibung des häuslichen, wissenschaftlichen, u. s. w. Zustandes der Römer. (Domestic Life, Literature, &c. of the Romans.) Vol. 1. Erfurt, 1788. Vol. 2. ibid. 1790. 8vo. A second edition of the second Volume was published by *Ernesti* 1796, and a third in 1812; of the first Volume, the 2d edition of which appeared in 1794, only the third edition was published by Ernesti, 1807.

J. L. Meyer, Lehrbuch der Römischen Alterthümer. Erlangen, 1797. A new edition, 1806. 8vo.

G. G. Koepke, Antiquitates Romanæ in XII tabulas descriptæ. Berlin, 1808. fol.

J. D. Fuss, Antiquitates Romanæ. Liege, 1820. 8vo. A new edition, with many alterations. ibid. 1826.

Creuzer, Abriss der Röm. Antiquitäten. Leipsic and Darmstadt, 1824. 2d edition, 1829. 8vo.

Tigerström, die innere Geschichte des Römischen Rechts. (Internal History of the Roman Law.) Berlin, 1838.

3. External and Internal.

Gravinæ Originum Juris Civilis libri III. The first book appeared at Naples, 1701, and at Leipsic, 1704. 8vo. The whole work at Leipsic, 1708. 4to. Afterwards with the addition of a treatise de Romano Imperio. Naples, 1713. 4to. It has since

passed through many editions, the latest of which are those of G. Mascow. Leipsic, 1737; and of J. A. Sergius, Naples, 1756–1758. 4to.

J. F. Reitemeier, Encyclopädie und Geschichte der Rechte in Deutschland. Gottingen, 1785. 8vo.

Ed. Gibbon, History of the Decline and Fall of the Roman Empire. Chap. 44. (See above § 20. note *a*.)

G. Hugo, Lehrbuch der Geschichte des Römischen Rechts bis auf Justinian. First Edition. Berlin, 1790. All the subsequent editions, with many alterations and improvements, appeared at the same place, respectively in 1799. 1806. 1810. 1815. 1818. 1820. 1822. 1824. 1826. 1832. A French translation of this work appeared under the title: Histoire du Droit Romain par Gust. Hugo; traduite de l'allemand sur la septième édition par Jourdan. Revue par F. Poncelet. Vol. first, containing the first periods of Roman history. Paris, 1822. (Reviewed by Hugo in the Gött. gel. Anz., 1822. No. 78. The beginning of a Latin translation superintended by Warnkönig, appeared at Amsterdam, 1825. (See the Thémis, Vol. 7. p. 352.)

F. A. Schilling, Bemerkungen über Röm. Rechtsgeschichte. (Observations on the History of the Roman Law; a Review of Hugo's Legal History.) Leipsic, 1829.

G. Hufeland, Lehrbuch der Geschichte und Encyclopädie aller in Deutschland geltenden positiven Rechte. (History and Encyclopædia of the positive Laws subsisting in Germany.) The work is left unfinished. The first division of the 1st Vol. containing the History of Roman Law, appeared at Jena, 1796. 8vo.

C. A. Günther, Historia Juris Romani. Helmstedt, 1798. 8vo.

A. Hummel, Handbuch der Rechtsgeschichte. (Manual of the History of the Roman Law.) 3 Vols. Giessen, 1805. 1806. 8vo.

Dupin, Précis historique du Droit Romain depuis Romulus. Paris, 1821. 8vo.

Schweppe, Römische Rechtsgeschichte und Rechtsalterthümer, mit erster vollständiger Rücksicht auf Gajus. (History and Antiquities of the Roman Law, containing the first complete references to *Gaius*.) Gottingen, 1822. 2d Ed. greatly enlarged, 1826. 3d Ed. by *Gründler*, 1832.

Zimmern, Geschichte des Röm. Privatrechts bis Justinian. 1st Vol. Heidelberg, 1826. 3d Vol. (on the Roman Proceedings at law), ibid. 1829. The 2d Vol. which was not published by the late author, will be edited by Huschke.

Klenze, Grundriss zu Vorlesungen über die Geschichte des Röm. Rechts. (Syllabus of a Course of Lectures on the History of Roman Law.) Berlin, 1827. 8vo. 2d Edition. 1836.

Stockhardt, Tafeln der Geschichte des Röm. Rechts. Leipsic, 1828. fol.

Holtius, Historiæ Juris Romani lineamenta. Liege, 1830. 8vo. and Utrecht, 1840.

Jannasch, Tabellarische Uebersicht der Röm. Rechtsgeschichte. Leipsic, 1831. 4to.

Walter, Röm. Rechtsgeschichte bis Justinian. Bonn, 1840. 8vo.

Christiansen, Die Wissenschaft der Röm. Rechtsgeschichte im Grundrisse. Altona, 1838.

H. A. A. Danz, Lehrbuch der Geschichte des Röm. Rechts. (Compendium of the History of Roman Law.) 1st Vol. Leipsic, 1840.

Burchardi, Staats- und Rechtsgeschichte der Römer. (History of the Law and Empire of the Romans.) Stuttgart, 1841.

G. F. Puchta, Institutionen (containing the History of the Law). Leipsic, 1841.

Tigerström, Die äussere Geschichte des Röm. Rechts. (External History of the Roman Law.) Berlin, 1841.

C. *History of the Roman Law in the Middle Ages.*

Haubold, Institutiones Juris Romani literariæ. Vol. 1. Leipsic, 1809.

G. Hugo, Lehrbuch der civilistischen Literärgeschichte. Berlin, 1812. 2d Ed. with the title, Lehrbuch der Geschichte des Röm. Rechts seit Justinian. (Compendium of the History of the Roman Law after Justinian.) Berlin, 1818. 3d Ed. 1830.

F. C. von Savigny, Geschichte des Röm. Rechts im Mittelalter. 6 Vols. Heidelberg, 1815. 1816. 1822. 1826. 1829. 1831. 8vo. The two first Vols. have been translated into French by Guenoux, at Paris; and the first one into English, under the title: The History of the Roman Law during the Middle Ages, by E. Cathcart. Vol. 1. Edinburgh, 1829.—A second edition of the three first Vols. was published 1834.

E. Lerminier, Introduction générale à l'Histoire du Droit. Paris, 1829.

D. *Collections of treatises on the Antiquities and History of the Law.*

1. By the same Author.

Barn. Brissonii Selectarum ex Jure Civili Antiquitatum libri IV. Lyons, 1558. 4to. Antwerp, 1585. 8vo. It has been frequently republished.

Ph. R. Schræderi Origines præcipuarum Juris Civilis materiarum. Konigsberg, 1723. 4to.

J. T. Mardatoritii Juris publici Romani Arcana sive de causis Romani Juris, in 6 Vols. Naples, 1767–82. 4to.

F. C. Conradi Parerga, in quibus Antiquitates et Historia Juris illustrantur. Helmstedt, 1740. 8vo.

2. By Different Authors.

J. G. Grævii Thesaurus Antiquitatum Romanarum, in 12 Vols. Utrecht, 1694–99. fol.

A. H. De Sallengre, Novus thesaurus Antiquitat. Rom. Vols. 1–3. Hague, 1716–19. fol.

J. Poleni Utriusque thesauri Antiquitatum Romanarum Græcarumque nova supplementa. Vols. 1–5. Venice, 1737. fol.

Jurisprudentia Romana et Attica. Edited by *J. Van der Linden*. Vols. 1. 2. (on Roman law), with a preface by Heineccius; the 3d Vol. (on Athenian law), with a preface by P. Weseling. Leyden, 1738–41. fol.

D. Fellenberg, Jurisprudentia antiqua. Vols. 1. 2. Berne, 1760. '61. 4to. Its later title is, Philosophia Juris antiqui. Frankfort and Leipsic, 1776. 4to.

Gust. Hugo, Civilistisches Magazin; a law periodical in 6 Vols. each 4 Numbers. Berlin, 1814–37.

Zeitschrift für geschichtliche Rechtswissenschaft (a periodical for the History of Legal Science). Edited by *Von Savigny*, *Eichhorn* and *Göschen*; commenced in 1815. When Göschen died, he was succeeded by *Klenze*, 1828; and the latter was followed, in 1842, by *Rudorff*. 11 Vols. Berlin.

Rheinisches Museum für Jurisprudenz, Philologie, Geschichte und Philosophie. Edited by Hasse, Böckh, Niebuhr, and Brandis. 1st Vol. Bonn, 1827. The legal department of the Museum was afterwards separately edited by Blume, Hasse, Puchta, and Puggé. 1830. 4 Vols. It is now continued under the title, Neues Rheinisches Museum für Jurisprudenz, by Blume, Böcking, Hollweg, Puchta, Puggé and Unterholzner. Gottingen, since 1832.

VI. Dogmatical Works.

*A. Compendiums and Abridgements.**

1. On the Institutes.

a. Following the Legal Arrangement.

Böckelmann, Compendium Institutionum, sive Elementa Juris Civilis. Leyden, 1679. With a preface by Heineccius. Amsterdam, 1727. ibid. 1763. 8vo.

Westenberg, Principia Juris secundum ordinem Institutionum Justiniani. Amsterdam, 1699. There have been many editions since; the latest, Leyden, 1765. (In his Works, Hanover and Luneburg, 1746. Vol. 1. p. 1.)

Heineccii Elementa Juris Civilis secundum ordinem Institutionum. Amsterdam, 1725. Leyden, 1751. With notes by Estor, 1727. 1744. This Compendium was afterwards rewritten by different other jurists, especially by Höpfner, Gottingen, 1778. 1782. 1787. 1796. 1806; by Woltär, Halle, 1785; by Biener, Leipsic, 1789. 1813; and by Waldeck, Gottingen, 1788. 1794. 1800. 1806.

Arnold, Elementa Juris Civilis Justinianei cum codice Napoleoneo juxta ordinem Institutionum collati. Paris and Strasburg, 1812. (With respect to the Roman Law, it copies *Heineccius's* Elements.)

Delvincourt, Juris Romani elementa secundum ordinem Institutionum. Paris, 1814. 4th Ed. ibid. 1823. 8vo.

Th. M. Zachariä, Institutionen des Röm. Rechts. Breslau, 1816.

b. Arranged Systematically.

Struvii Jurisprudentia Romano-Germanica. Jena, 1670, many editions since; the latest with annotations by Schaumburg and Mencken. Frankfort, 1760. 4to., afterwards by Heineccius. Bamberg, 1767.

Hofacker, Institutiones Juris Romani. Gottingen, 1773; and his Elementa Juris Rom. 1784. 8vo.

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* Dr. Rosshirt, in this connexion, quotes the following passage from Böcking (Inst. p. 144): "The trifling practice of versification, as also of making mnemonical figures, which has been employed, especially upon the Institutes, and the various attempts which have been made to represent their contents under the form of a scheme, are of very little value. And of still less use are the expedients that have been contrived in order to furnish mechanical aids for the study of the law, by turning the topics of the Institutes (and lately also of the Pandects) into questions and answers; or by furnishing editions of the text, in which the passages and words to be committed to memory are printed in red, and the rest in black ink."

In every department of study in Germany, the scientific method has long had the preference; but at different times, books and expedients possessing little of a scientific character have been prepared for the use of beginners, by individuals who desired to save them the pains and labour of hard study, or to subserve the convenience and comfort of those who are satisfied with such knowledge, however superficial, as is most easily acquired. The causes from which this practice arose appear to have been: 1. the want of that opportunity for general information on political and legal matters, which is afforded by free institutions, and by the publicity of proceedings at law; 2. the extent of the Roman law, and the increased difficulty of obtaining a familiar acquaintance with the law of an ancient and foreign nation; 3. the systematic separation of the study of the theory from that of the practice of the law; 4. the perverse method of instruction adopted by most professors, who load the minds of their pupils

G. Hugo, Institutionen des heutigen Röm. Rechts. (Institutes of Modern Roman Law.) Gottingen, 1789. 1799. 1805. 10. 16. 1820. 26. 8vo.

J. Schmalz, Handbuch des Römischen Privatrechts. Konigsberg, 1793.

Konopack, Institutionen des Römischen Rechts. Halle, 1807. 2d edition. 1825. 8vo.

Brinkmann, Institutiones Juris Romani. Gottingen, 1818; 2d edition. Sleswick, 1822. 8vo.

Warnkönig, Institutiones sive elementa Juris Romani. Liege and Leipsic, 1819; 2d edition, ibid. 1825. 8vo.

Maciejowski, Principia Juris Romani. Warsaw, 1820. 8vo.

Rosshirt, Grundlinien des Römischen Rechts. (Outlines of Roman Law.) Heidelberg, 1824. 8vo.

J. J. Lang, Lehrbuch des Justinianeischen Rechts. Mayence, 1830. 8vo.

H. Blondeau, Chrestomathie (see above § 106. note *k*).

G. F. Puchta, Institutionen (mentioned above).

Haubold, Institutionum Juris Romani lineamenta. Leipsic, 1814. A 2d enlarged edition has been published since the author's death by Otto. Leipsic, 1826.

L. Pernice, Geschichte, Alterthümer und Institutionen des Röm. Rechts. Halle, 1821; 2d edition rewritten with additions. ibid. 1824. 8vo.

W. M. Rossberger, Röm. Rechts-Institutionen. Berlin, 1828. 8vo.

M. S. Mayer, Das Römische Privatrecht nach seinen allgemeinen Grundsätzen (General principles of the Roman Private Law). Stuttgart, 1831. 8vo.

E. Böcking, Grundriss zu Institutionen-Vorlesungen (A Syllabus for Lectures on the Institutes). Bonn, 1832.

Burchardi, Geschichte und Institutionen des Röm. Rechts. Kiel and Altona, 1834.

F. A. Schilling, Lehrbuch für Institutionen und Geschichte des Röm. Privatrechts. 1st Vol. Leipsic, 1834. 2d Vol. 1837.

T. Marezoll, Lehrbuch der Instituti onen des Röm. Rechts. Leipsic, 1839; 2d edition, 1842.

E. Böcking, Institutionen. Bonn, first Number 1841.

P. H. Fr. Hänsel, Handbuch der Institutionen des Rechts. 1st Vol. Leipsic, 1842.

F. C. Mühlenbruch, Lehrbuch der Institutionen des Röm. Rechts. Halle, 1842.

2. On the Pandects.

a. Following the Legal Arrangement.

Wesenbeccii Paratitla in Pandectas. Basle, 1565. fol. Afterwards under the title, Commentarius in Pandectas, edited by P. Brederodius, ibid. 1589, and Erfurt, 1616. fol. and with notes by Vinnius and others. Leyden, 1649. 4to.; several editions since with annotations by other editors.

J. Voetii Compendium Juris juxta seriem Pandectarum. Leyden, 1682. 8vo.; several editions since; the latest ibid. 1737.

J. H. Bœhmeri Introductio in jus Digestorum. Halle, 1704; the 14th edition. ibid. 1791. 8vo.

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with elegant and learned rubbish, instead of fitting them for the practical purposes of life and of their profession. Such works, however, as those above spoken of, although they originated in the correct conviction that something should be done for facilitating and simplifying legal studies, were incapable, on account of their superficialness, of furnishing any essential aid for the promotion of this object.

G. Beyeri Delineatio Juris Civilis secundum Pandectas. Leipsic, 1704. 1711. 1718; and again ibid. 1738. 4to.

Westenberg, Principia Juris secundum ordinem Digestorum. Leyden, 1732. ibid. 1745. 1764. Latest edition, Berlin, 1814 and 1823. 2 Vols.

Heineccius, Elementa Juris Civilis secundum ordinem Pandectarum. Amsterdam, 1728. ibid. 1731. Strasburg, 1734. Amsterdam, 1740. Utrecht, 1772. Edited by Richter; Leipsic, 1797.

Hellfeld, Jurisprudentia forensis secundum ordinem Pandectarum. Jena, 1764. 1766. 1771. 1775. 1779; edited by Oeltze, ibid. 1787. 1792. 1797; by Köchy, ibid. 1801; and by L. C. Hellfeld, Jena, 1806.—Comments upon this work are contained in: *Weber's* Erläuterungen der Pandecten nach Hellfeld, edited by A. W. L. Weber (after his father's death). Leipsic, 1820. 2 Vols.

J. F. Malblanc, Principia juris Romani secundum ordinem Digestorum. 2 Parts. Tubingen, 1802. 8vo.

b. Arranged Systematically.

Dabelow, System des heutigen Civilrechts. 2 Vols. Halle, 1794. 8vo. 2d Ed. 1796. 3d Ed. with the title, Handbuch des heutigen gemeinen römisch-deutschen Privatrechts. Halle, 1803. 8vo.

Thibaut, System des Pandekten-Rechts. Jena, 1803. 2 Vols. 8vo. New editions: 1805. 1808. 1813. 1817. 1822. 3 Vols. The 3d Vol. contains the civil proceedings. 7th Ed. 1828. 2 Vols. (without the Civ. Proc.) 8th Ed. greatly altered. Jena, 1834. (See Heidelberger Jahrbücher 1834, No. 51.)

Braun's Erörterungen über die bestrittensten Materien des Röm. Rechts. Stuttgart, 1831; afterwards edited by Troben. (This work contains copious comments on Thibaut's System.)

Zauner, Introductio in jus Digestorum. 3 Vols. Saltzburg, 1805, 1806, and 1810.

C. A. Günther, Principia Juris Romani privati novissimi, Vol. 1. Jena, 1805. Vol. 2. ibid. 1809. 8vo. See on this: Glück, Handbuch zum systematischen Studium des neuesten Römischen Privatrechts. 1. Vol. Erlangen, 1812. unfinished.

H. G. Wittich, System des heutigen Civil-Rechts. (System of modern Civil Law.) 3 Vols. Frankfort. 1805. 8vo.

J. C. F. Meister, Jus Romanum idque purum. Vol. 1. Zullich, 1813. left unfinished.

G. Hufeland, Lehrbuch des in den deutschen Ländern geltenden gemeinen Civilrechts. (Compendium of the common Civil Law.) Giessen, 1808 and 1814. 2 Vols.

Bucher, System der Pandekten. Marburg, 1808. 2d Edition enlarged and improved. 1811 ibid. 3d. ibid. 1822. 8vo.

C. von Weyhe, Wissenschaftliche Bearbeitung des allgemeinen deutschen Privatrechts. (Scientific Exposition of the German Common Law.) Gottingen, 1815. It contains merely the general heads of the law.

Joh. Kaufmann, Anfangsgründe des Röm. Rechts. 4 Vols. Vienna and Trieste, 1814–16. 8vo.

Schweppe, Das Römische Privatrecht in seiner heutigen Anwendung. (Roman Law and its present application.) It first appeared at Gottingen, 1804. Kiel, 1806. 1812; afterwards at Altona, 1814. 19 & 22; again at Gottingen 1828, in 2 Vols. It was continued after the author's death by *Meyer*. Vol. 3d. ibid. 1831. Vol. 4. 1832. Vol. 5. 1833. (See Rosshirt, Heidelberger Jahrbücher, No. 51. 1834.)

Wening-Ingenheim, Lehrbuch des gemeinen Civilrechts. 2 Vols. Munich, 1822. 2d. Edition, 1825. 3d. 1827. 4th. 1832. in 3 Vols. 8vo. A new edition by Fritz, 1836. See on this work: *Fritz*, Erläuterungen, Zusätze und Berichtigungen zu *Wening's* Lehrbuch. 3 Nos. Freiburg, 1833. 8vo.

J. A. Seuffert, Lehrbuch des praktischen Pandektenrechts. 3 Vols. Wurtzburg, 1825.

Mühlenbruch, Doctrina Pandectarum. 3 Vols. Halle, 1823–5. 2d Edition, ibid. 1827. 3d Ed. ibid. 1830, '31. German Translation, 1835. (See Heidelberger Jahrbücher, l. c.)

Warnkönig, Commentarii Juris Romani privati. 3 Vols. Liege, 1825–1829. 8vo.

C. J. Meno Valett, Lehrbuch des praktischen Pandekten-Rechts. 3 Vols. Gottingen, 1828–29. 8vo.

A. Haimberger, Jus Romanum privatum idque purum. 4 Vols. Lemberg, 1830. 8vo.

Heise, Grundriss eines Systems des gemeinen Civilrechts. Heidelberg, 1807. 1816. 1819. 1825. 8vo.

F. Bergmann, Abriss eines Systems der Pandekten. Gottingen, 1810. 8vo.

Unterholzner, Lehrgebäude des bei den Römern geltenden Rechts. (Syllabus for a System of the Roman Law.) Breslau, 1817. 8vo.

Haubold, Doctrinæ Pandectarum lineamenta. Leipsic, 1820. 8vo.

Burchardi, System des Röm. Rechts im Grundrisse. (Outlines of the System of Roman Law.) Bonn, 1823. 8vo. See also his Grundzüge des Rechts-Systems der Römer, aus ihren Begriffen von öffentlichem und Privatrecht entwickelt. (Legal Principles of the Romans derived from their views of public and private Law.) Bonn, 1822. 8vo.

Rossberger, System des gemeinen Civilrechts. Berlin, 1826. 8vo.

Ed. Gans, System des Röm. Civilrechts. Berlin, 1827. 8vo.

Blume, Grundriss des Pandekten-Rechts. Halle, 1829. 8vo.

Von Hartitzsch, das Röm. Privatrecht in ausführlicher tabellarischer Darstellung. (A minute Synopsis of the Roman Private Law.) Leipsic, 1831. 8vo.

G. F. Puchta, System des gemeinen Civilrechts. 1832. 8vo. Later edition under the title, Pandekten-Lehrbuch. (Compendium of the Pandects.) Ibid. 1838.

J. F. Kierulf, Theorie des gemeinen Civilrechts. Altona, 1839. Comp. also *E. F. Vogel*, Untersuchungen über die Bestandtheile, Natur und wissenschaftliche Stellung des Pandektenrechts. (Enquiries into the constituent parts, the nature, and literary character of the law of the Pandects.) Leipsic, 1831. 8vo.

Rosshirt, Lehrbuch des gemeinen Civilrechts. Heidelberg, 1840. 1841. in 3 Vols.

Savigny, System des heutigen Römischen Rechts. 1840, 1841. 5 Vols.

B. Manuals and Commentaries.

1. On the Institutes.

Theophili Paraphrasis Græca Institutionum. Edited by J. C. Reitz. Hague, 1751. in 2 Vols. 4to. (See above, § 67.)

Huber, Prælectiones Juris Civilis secundum Institutiones. Frankfort, 1686. 1699. Edited by Thomasius. Leipsic, 1708. With notes by Mencken, Leipsic, 1725. 4to. Many editions since.

Heineccii Recitationes in elementa Juris Civilis secundum ordinem Institutionum. Breslau, 1765. 1778. Many editions have been published since; the last by Rycker, 1818. 8vo.

Höpfner, Theoretisch-Praktischer Commentar über die Heineccischen Institutionen. First 6 editions, Frankfort, 1783–1798; the 7th with notes and additions by A. D. Weber, ibid. 1803; 8th edition, ibid. 1813. 4to; and republished 1833.

M. A. Du Caurroy de la Croix, Institutes de Justinien nouvellement expliquées, 3 Vols. Paris, 1822–25. 3d. Edition, Paris, 1829.

2. On the Pandects.

a. Following the Legal Arrangement.

M. Wesenbeck, Paratitla in Pandectas. (See above, p. 111.)

J. Meieri Collegium Argentoratense. Strasburg, 1616. 17. 5. with annotations by J. O. Tabor. Edited by Bechtold in 3 Vols. Strasburg, 1657. 4to.

Huber, Prælectiones Juris Civilis secundum Pandectas, Frankfort, 1686. 1699. Edition by Thomasius. Leipsic, 1708. With notes by Mencken. Leipsic, 1725; and again, revised by Rivinus, 1733. 4to. The latest edition, Frankfort and Leipsic, 1749. 4to.

Struvii Syntagma Juris Civilis cum additionibus Mülleri. 3 Vols. Frankfort and Leipsic, 1692. Many editions since; the latest, 1742. 4to.

Lauterback, Collegium theoretico-practicum ad Pandectas. 3. Vols. Tubingen, 1690. The last of the many later editions, 1784. 4to. (See Lipenii Bibliotheca. Vol. 1. p. 737.)

Voet, Commentarius ad Pandectas. Vol. 1st. Leyden, 1698. fol. Vol. 2d. Hague. 1704. fol. Ibid. 1707. 1716. 1723. 1731. 1734. and often since. Latest edition, Halle, 1776–1780. 6 Vols. 8vo.

Noodt, Commentarius in Pandectarum lib. I–IV. Leyden, 1716. 4to. in lib. V–XXVII., in his works. Vol. 2d. Leyden, 1724.

Glück, Ausführliche Erläuterung der Pandekten nach Hellfeld. 34 Vols. Embracing the first 27 books of the Pandects. Erlangen 1790–1830. 8vo. Tables of contents to the 34 Volumes, ibid. 1822. 1823. 1832. (3 Vols.) It was continued by the late *Mühlenbruch*. 8 Vols. 1832–1841. See also *Reinhardt*, Ergänzungen zu Glück's Erläuterung der Pandekten. 4 Vols. Stuttgart, since 1833.—This work of Glück's is the most comprehensive and complete that has appeared on the Roman Law.

b. Arranged Systematically.

Franc. Connani Commentariorum Juris Civilis libri X. Vol. I. II. Paris, 1553. fol, Latest edition Naples, 1724.

Hugo Donellus, Commentariorum Juris Civilis libri XXVIII. 6 Vols. Frankfort, 1589–1597. Hanover, 1612. Frankfort, 1626. fol. Latest edition by *König* and *Bucher*. 43 Vols. Nuremberg, 1801–1830. A splendid edition of Donellus's Commentaries has been published in London, in 12 Vols. imp. fol.

Domat, Les Lois Civiles dans leur ordre naturel. (See above, § 106. note *a*, where the various editions are mentioned.)

Hofacker, Principia Juris Civilis Romano-Germanici. 3 Vols. Tubingen, 1788–1798. 8vo. 2d Ed. ibid. 1800–1803. An Index rerum et verborum to the work was published by Faulhaber, ibid. 1801.

C. Monographs.

The works on single parts and heads of the Roman Law will be mentioned under the subdivisions to which they belong, and will be found in the Alphabetical List of authorities cited, prefixed to the present edition of this Compendium.

D. Controversies.

A. Merendæ Controversiarum Juris Civilis libri XXIV. Ticino, 1624–47. in 4 Vols. fol. Venice, 1710. Brussels, 1745.

Sam. De Cocceii Jus Civile controversum. Frankfort on the Oder, 1729. 4to. The last edition with a preface by C. F. Walch and notes by J. E. B. Emminghaus. Leipsic, 1791–98. 2 Vols. 4to.

C. F. Walch, Introductio in controversias Juris Civilis. Jena, 1771. Ibid. 1776. Ibid. 1791. 4th edition edited by C. E. Schmid. Vol. 1. Numbers 1 and 2. Ibid. 1810. 8vo.

Vangerow, Leitfaden für Pandekten-Vorlesungen. (Guide to Lectures on the Pandects.) Marburg, 1839. 1st Vol. 1840. 2d Vol. 1842.

E. On the present Use and Application of the Civil Law.

J. Schilter, Exercitationes ad quinquaginta libros Digestorum. Jena, 1675–1680. 4to. Afterwards under the title, Praxis Juris Romani in foro Germanico. Jena, 1698. Leipsic, 1713. Frankfort, 1733. fol.

Berger, Œconomia Juris ad usum hodiernum accommodati. Leipsic, 1712. 4to.; and often since. The 6th edition by J. A. Bach, ibid. 1755; the 7th by Winckler, ibid. 1771; the 8th edition by Haubold. Vol. 1. ibid. 1801. (Only the first Volume of this edition has appeared.)

Sam. Stryk, Usus modernus Pandectarum. Vols. 1–4. 5th Edition, Halle, 1717. 4to.

J. H. Böhmer, Exercitationes ad Pandectas. Edited by G. L. Böhmer, Vols. 1–6. Hanover and Gottingen, 1745–64. 4to.

Dav. Mevii Decisiones Wismariensis tribunalis. Stralsund, 1654–75; and often since. The last edition is by Höpfner, Vols. 1 and 2. Frankfort, 1791–4. fol.

Leyser, Meditationes ad Pandectas. The first 9 Vols. Leipsic, since 1717. 4to. 2d Ed. ibid. 1733–1741. The first 6 Vols. 3d Ed. ibid. 1741–1744. 10th Vol. ibid. 1747. 11th Vol. Edited by *Jenichen*, ibid. 1748; and again 1772 et seqq. 12th and 13th Vol. Edited by Höpfner. Giessen, 1744, '80. 4to.

Müller, Observationes practicæ ad Leyseri Meditationum opus. 6 Vols. Leipsic, 1786–93. 8vo.

Wernher, Selectæ Observationes forenses. 9 Vols. Wittenberg, 1710–1722. 4to.—3 Vols. Jena & Leipsic, 1786. fol.

Pufendorf, Observationes juris universi. 4 Vols. Celle and Hanover, 1644–1770. 4to. ibid. 1780–1784. Idem, Animadversiones juris. Vol. 1st. Hanover, 1788. 4to.

Hommel, Rhapsodia Quæstionum in foro obvenientium. Leipsic, 1765, '66. 4to. Latest Edition by Rössig. Bayreuth, 1782–1787. 4to. 7 Vols.

Struben, Rechtliche Bedenken. (Legal Arguments.) 5 Vols. Hanover, 1760. 2d Ed. 1772–1786. Systematically arranged, enlarged, and furnished with notes, by *E. Spangenberg*. 3 Vols. Hanover, 1827 & 28. 4to.

Kind, Quæstiones forenses. 4 Vols. Leipsic, 1792–1802. 2d Ed. enlarged and improved. 1807. 8vo.

Geiger and *Glück*, Merkwürdige Rechtsfälle. (Remarkable Cases.) 3 Vols. Erlangen, 1792, 1794, 1806. 8vo.

Bülow and *Hagemann*, Praktische Erörterungen. (Practical Discussions.) Vol. 1–4. Hanover, 1798–1804. Continued by Hagemann. Vols. 5–7. 1809–1824; and by *E. Spangenberg*. Vol. 8th. 1829.

Günther, Rechtliche Bemerkungen. (Legal Observations.) Vol. 1. Helmstedt, 1802. 8vo.

B. W. Pfeiffer, Praktische Ausführungen aus allen Theilen der Rechtswissenschaft. (Practical Argumentations on all branches of the Law.) Vol. 1st. Hanover, 1825. Vol. 2d. ibid. 1828. 3d Vol. 1831. 4to.

C. A. Gottschalk, Selecta Disceptationum forensium capita. There are appended to it, Decisions of the Supreme Appeal Court of Saxony. 3 Vols. Dresden, 1816, '19, '23. 8vo. 2d Edition. Ibid. 1826, '30.

Langenn and *Kori*, Erörterungen aus dem gemeinen und sächsischen Rechte. (Discussions on the Civil and Saxon Law.) Vols. 1. 2. Dresden and Leipsic, 1829. 1831. 8vo.

A. Heise and *F. Cropp*, Juristische Abhandlungen. (Juridical Treatises.) Vol. 1. Hamburg, 1827. Vol. 2d. ibid. 1830. 8vo.

Paul L. Kritz, Sammlungen von Rechtsfällen und Entscheidungen derselben. (Collections of Cases and Decisions.) Vol. 1. Leipsic, 1833. 8vo.

F. Collections of Treatises on single subjects of the Roman and German Private Law.

1. By the same Author.

Ant. Fabri de Erroribus pragmaticorum et interpretum Juris. Latest edition, Lyons, 1658. 2 Vols. fol.

Aug. Vinnii Selectæ Quæstiones Juris Civilis. Lyons, 1653. 8vo. Several editions since; the last, Utrecht, 1722. 4to.

A. Menagii Amœnitates Juris Civilis. Paris, 1664. Enlarged in 1677. 8vo.

Huber, Digressiones Justinianeæ. The 3d edition. Frankfort, 1696. 4to.

W. A. Lauterbach, Dissertationes academicæ. Vols. 1–4. Tubingen, 1728. 4to.

J. N. Hert, Opuscula, edited by J. J. Hombergk. 2 Vols. Frankfort, 1737. 4to.

H. De Coccii Exercitationes curiosæ. 2 Vols. Lemgo. 1722. 4to.

J. P. Ludewig, Opuscula miscellanea. Vols. 1 & 2. Halle, 1620. fol.

G. Majansii Disputationes Juris. Vols. 1 & 2. Leyden, 1752. 4to.

A. Schulting, Commentationes academicæ. Edited by Uhle. 4 Vols. Halle, 1770 74. 8vo.

F. C. Conradi, Scripta minora. With a preface and annotations by Pernice. Vol. I. Halle, 1823. 8vo.

J. L. Conradi, Varia ex Jure Civili. Marburg, 1764. 8vo. Idem, Opuscula e Jure Civili. 2 Vols. Bremen, 1777 & 78.

Meister, Opuscula selecta. Gottingen, 1766–1775. 8vo.

G. L. Böhmer, Electa Juris Civilis. 3 Vols. Gottingen, 1777 & 1778. 4to.

Püttmann, Adversaria juris universi. Libri I–III. Leipsic, 1775–1788. 8vo.

Glück, Opuscula juridica. 4 Vols. Erlangen, 1785–90. 8vo.

Quistorp, Beiträge zur Erläuterung verschiedener Rechtsmaterien. (Illustrations of different branches of Law.) Rostock, 1787. 8vo. Idem, Rechtliche Bemerkungen. (Legal Observations.) Leipsic, 1793. 4to.

A. D. Weber, Versuche über das Civilrecht und dessen Anwendung. (Essays on the Civil Law and its practical Application.) Schwerin and Wismar, 1801. 8vo.

Thibaut, Versuche über einzelne Theile der Theorie des Rechts. (Essays on different parts of the Theory of Law.) Jena, 1798–1801. 8vo. 2d Ed. 1817. Idem, Civilistische Abhandlungen. (Civil Law Treatises.) Heidelberg, 1814. 8vo.

Feuerbach, Civilistische Versuche. (Essays on the Civil Law.) Giessen, 1803. 8vo.

Pfeiffer, Vermischte Aufsätze über Gegenstände des deutschen und römischen Privatrechts. (Miscellaneous treatises on subjects of the German and Roman Private Laws.) Marburg, 1803. 8vo.

Schöman, Handbuch des Civilrechts, in einzelnen Abhandlungen. (Manual of the Civil Law, consisting of single treatises.) 2 Vols. Giessen, 1806. 8vo.

E. Schrader, Abhandlungen aus dem Civilrechte. (Treatises on the Civil Law). Hanover, 1808. Idem, Civilistische Abhandlungen. (Civil Law Treatises.) Weimar, 1816. 8vo.

G. Hufeland, Ueber den eigenthümlichen Geist des Römischen Rechts. (On the Spirit of the Roman Law; a series of treatises.) 2 Vols. Giessen, 1815–1817. 8vo. Idem, Beiträge zur Berichtigung und Erweiterung der positiven Rechtswissenschaft. (Contributions to the improvement and enlargement of the science of positive Law.) 6 Nos. Jena, 1802.

C. C. Dabelow, Handbuch des Pandektenrechts, in einer kritischen Revision seiner Hauptlehren. (Manual of the law of the Pandects; a critical examination of its principal doctrines.) Halle, 1816–18. 3 Vols. 8vo.

Unterholzner, Juristische Abhandlungen. (Treatises on Law.) Munich, 1810. 8vo.

Bülow, Abhandlungen über einzelne Materien des römischen bürgerlichen Rechts. (Treatises on different subjects of the Roman Civil Law). In 2 Vols. Brunswick, 1818. 8vo.

E. Kämmerer, Beiträge zur Geschichte und Theorie des Röm. Rechts. (Contributions to the History and Theory of the Roman Law.) 1 Vol. Rostock and Schwerin, 1817. 8vo.

A. Schweppe, Jurist. Magazin. Part 1. Altona, 1818. 8vo.

J. F. Gesterding, Alte und neue Irrthümer der Rechtsgelehrten. (Ancient and Modern Errors of the Jurists.) Greifswald, 1818. Idem, Ausbeute von Nachforschungen über verschiedene Rechtsmaterien. (Results of Meditations on different matters of Law.) In 7 Vols. ibid. 1826–41. 8vo.

C. F. Reinhard, Vermischte Aufsätze aus dem Gebiete der reinen und angewandten Rechtswissenschaft. (Miscellaneous Treatises on subjects of abstract and practical Law.) 3 Nos. Stuttgart, 1822–27. 8vo.

J. A. Seuffert, Erörterungen einzelner Lehren des Röm. Privatrechts. (Discussions of different doctrines of Roman Private Law.) In 2 Vols. Wurtzburg, 1820. 1821. 8vo.

H. E. Dirksen, Civilistische Abhandlungen. (Treatises on Civil Law.) Berlin, 1820. 2 Vols. 8vo. Idem, Beiträge zur Kunde des Röm. Rechts. (Contributions to the knowledge of the Roman Law.) Leipsic, 1825.

L. J. Neustetel and *S. Zimmern*, Römisch-rechtliche Untersuchungen. (Enquiries on subjects of Roman Law.) Vol. 1. Heidelberg, 1821. 8vo.

G. F. Puchta, Civilistische Abhandlungen. Leipsic and Berlin, 1823. 8vo.

P. L. Kritz, Abhandlungen über ausgewählte Materien des Civilrechts. (Treatises on select matters of the Civil Law.) Leipsic, 1824.

C. J. Meno Valett, Abhandlungen aus dem Gebiete des Römischen Privatrechts. (Treatises on subjects in the department of Roman Private Law). 1 Vol. Gottingen, 1824. 8vo.

Haubold, Opuscula academica. Vol. 1st, edited by Wenck. Leipsic, 1825. Vol. 2d, by Stieber, ibid. 1829. 8vo.

C. G. Biener, Opuscula academica. Edited with a preface by F. A. Biener, in 2 Vols. Leipsic, 1830. 4to.

W. Francke, Civilistische Abhandlungen. Gottingen, 1826. 8vo. Idem, Beiträge zur Erläuterung einzelner Rechtsmaterien. (Illustrations of different matters of Law.) Ibid. 1828.

C. A. Weiske, Sceptisch praktische Behandlung einiger Gegenstände des Civilrechts (Practical treatises on several subjects of the Civil Law, with critical remarks). Leipsic, 1829. 8vo.

C. J. Guyet, Abhandlungen aus dem Gebiete des Civilrechts (Treatises on subjects of the Civil Law). Heidelberg, 1829.

P. E. Huschke, Studien des Röm. Rechts. 1 Vol. Breslau, 1830. 8vo.

H. R. Brinkmann, Wissenschaftlich-praktische Rechtskunde. (On Practical Legal Science.) Sleswick, 1831. 8vo.

A. A. von Buchholtz, Versuche über einzelne Theile der Theorie des heutigen Röm. Rechts. (Essays on single parts of the Theory of Modern Roman Law.) Berlin, 1831. Idem, Juristische Abhandlungen aus dem Gebiete des Röm. Rechts. (Treatises on different subjects of Modern Roman Law.) Konigsberg, 1833.

W. Müller, Civilistische Abhandlungen. 1 Vol. Giessen, 1833. 8vo.

K. Röder, Abhandlungen über praktische Fragen des Civilrechts. (Essays on practical Questions of the Civil Law.) Giessen, 1833. 8vo.

W. Sell, Versuche im Gebiete des Civilrechts. (Essays on different matters of the Civil Law.) 1 Vol. Giessen, 1833. 2d Vol. 1834.

C. Heyer, Abhandlungen aus verschiedenen Theilen der Rechtswissenschaft. (Treatises on different parts of Legal Science.) Giessen, 1841.

2. By different Authors.

Tractatus universi juris, duce et auspice Gregorio XIII. in unum congesti. (Tractatus tractati.) Venice, 1584. in 18 Vols. fol. With 4 Vols. of Indices.

E. Ottonis Thesaurus Juris Romani. Leyden and Utrecht, 1725. in 4 Vols. fol. Utrecht, 1733–1735. Basle, 1744. in 5 Vols. fol.

G. Meermann, Novus Thesaurus Juris Civilis et Canonici. Hague, 1751–1753. in 7 fol. Vols.; with a supplement after the author's death by J. L. B. Meermann. Hague, 1780. fol.

Geo. Oelrichs, Thesaurus dissertationum juridicarum in acad. Belg. habitarum. Leipsic, 1769. 1770 in 2 Vols. 4to. Thesaurus novus. Bremen, 1771–82. 3 Vols. 4to.

Theod. Hagemann and *C. A. Günther*, Archiv für theoretische und praktische Rechtsgelehrsamkeit (Archives of theoretical and practical Law Science). 6 Vols. Brunswick, 1788–92. 8vo.

Besides the legal periodicals, which have already been mentioned, the following deserve to be noticed:—

Grolman, Magazin für die Philosophie und Geschichte des Rechts und der Gesetzgebung (Magazine for the Philosophy and History of Law and Legislation). In 2 Vols. The 3d Vol. was edited with the assistance of *Löhr*. From the 4th Vol. it received the title, Neues Magazin für Rechtswissenschaft und Gesetzgebung. Published at Giessen, 1800–25. 5 Vols.

Archiv für civilistische Praxis, edited by *Gensler*, *Mittermaier*, *Schweitzer*, and others. 26 Vols. Heidelberg, since 1818.

Zeitschrift für Civilrecht und Process. Edited by *Linde*, *Marezoll* and *Weising-Ingenheim*, and after the death of the last by *Schröter*. 18 Vols. Published at Giessen, since 1828.

Themis, Zeitschrift für praktische Rechtswissenschaft. Edited by *Elvers*. 2 Vols. Gottingen. 1827–1829. Neue Themis. Nos. 1 and 2. 1840–1.

Thémis, ou Bibliothèque du Jurisconsulte, par une réunion de magistrats, de professeurs et d'avocats. Vols. 1–7. Paris, 1819. Vols. 8–10. Brussels, 1825–1831. 8vo.

Bydragen tot Regtsgeleerdheid en Wetgeving. By *C. A. Den Tex* and *J. Van Hall*. Vols. 1–6. Amsterdam, 1826–32. 8vo.

F. C. K. Schunck's Jahrbücher der gesammten deutschen juristischen Literatur. (Annals of the whole German Legal Literatur.) Vols. 1–17. Erlangen, 1826–1831. A new continuation from the 18th to the 30th Volume. Neustadt on the Orla, 1832–1836.

Kritische Zeitschrift für Rechtswissenschaft. Edited by *R. Mohl*, *C. Scheurlen*, *E. Schrader*, *C. G. Wächter* and *K. Wächter*. 6 Vols. Tubingen, 1826–1830. 8vo.

Richter and *Schneider*, Kritische Jahrbücher. Leipsic, since 1837; still continued.

Rosshirt, Zeitschrift für Civil- und Criminalrecht. Heidelberg, 1st Vol. 1831–33. 2d Vol. 1834–36. 3d Vol. 1840. 4th Vol. 1842.

K. Sell und *W. Sell*, Jahrbücher für historische und dogmatische Bearbeitung des römischen Rechts. (Annals of the History and Theory of the Roman Law.) Brunswick, 2 Nos. 1841.*

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* The Editor considered it his duty to give the foregoing list of works on the Roman law, in its full extent; the more so, as nearly all of them are of greater or less importance, and possess peculiar merits of their own. Yet, although this list is far from being complete, it contains so large a number of works, that the majority of readers may well desire to have a selection made for them of a few of the most valuable for practical purposes. The Editor has, therefore, considered it proper to recommend the following to their particular attention:

1. An *introductory* view of the Roman law may be best obtained from *Spangenberg's* Einleitung in das Römisch-Justinianeische Rechtsbuch; and *Clossius*, Hermeneutik des Römischen Rechts.

2. A most excellent *text* of the Corpus Juris is contained in the critical editions of the same by *Gebauer* and *Spangenberg*, by *Beck*, and by *Kriegel*.

3. The most important *exegetical* works are the Glossa Accursiana, *Cujacii* Opera, and *Donelli* Comm. Jur. Civilis.

4. The *compendiums* best adapted to the study and to the present state of science are: *Thibaut*, System des Pandecten-Rechts, 8th Edition; *Mühlenbruch*, Doctrina Pandectarum, 3rd Ed.; *Savigny*, System des heutigen röm. Rechts; *Hofacker*, Principia Juris Civilis, 2d Ed.; *Wening*, Lehrbuch des Civilrechts, 4th Ed.; *Hufeland*, Pandekten-Compendium; *Valett*, Lehrbuch des Pandektenrechts; *Höpfner*, Commentar; edited by A. D. Weber, 8th Ed.

5. Works of practical use for *reference*, besides those included under the last head (No. 4), are: *Lauterbach*, Collegium theoretico-practicum, 6th Edition; *Leyser*, Meditationes ad Pandectas; *Müller*, Observationes ad Leyseri Meditt.; *Müller*, Promptuarium Juris novum, 2d Edition; *Meier*, Collegium Argentoratense; *Voet*, Comment. ad Pandectas; *Gluck*, Erläuterung der Pandecten, in 42 Vols.

GENERAL PART.*

FIRST DIVISION.

GENERAL LEGAL VIEWS OF THE ROMANS.

I. Jus et Justitia.

§ 112. LAW was considered by the Romans as primarily founded on morality, and on a voluntary respect for all that was good and noble.[a] In their view, compulsion was no essential element of a law.[b] "*Jus*,"

(*a*) *Cicero* de off. lib. 1. c. 28.—*Hugo*, Naturrecht. 4th Edition. § 15.—*Welcker*, Die letzten Gründe von Recht, Staat und Strafe. p. 450.

(*b*) The Romans, indeed, were not unacquainted with the difference between compulsory and incompulsory duties. *Cicero* de off. lib. 1. c. 3.—*Seneca* de Ira. lib. 1. c. 27.—fr. 144. pr. D. 50. 17. "Non omne quod licet, honestum est."—fr. 197. ibid.—fr. 42. pr. D. 23. 2.—fr. 1. § 5. D. 50. 13.—But their distinction between morals and the law of nature was

* The failure of the attempts that have been made to establish a set of primary legal principles, and to represent all the special principles of the law as consequences derived therefrom, must render the impracticability of such an undertaking obvious to all reflecting minds. A positive science, the truths of which owe their origin in a great measure to accidental circumstances or to arbitrary design, does not admit of being reduced to a certain number of fundamental principles, from which all the special rules presented by it may be derived. All that is to be done, is to systematize the science of law by dividing it into principal parts, and each part again into its main topics; arranging them so as to combine all the provisions that relate to the same subject, and in each case treating of general matters before proceeding to those of a special character. All that can be accomplished beyond this, is to represent as a connected whole those fundamental principles of legal science that are of constant recurrence in all parts of the law. To the performance of this task the exertions of law writers have as yet been too little devoted. Hitherto their efforts have been chiefly directed, and in part with distinguished success, to bringing together all the general principles that apply to the different subjects of a single branch of the law. Such a collection of general principles is what is usually denoted by the term, "General Part." This has been done only for the Roman private law, the criminal law, and the law of civil and criminal proceedings. The Editor hazards nothing in asserting that the most signal service in this respect for the Roman private law, has been performed by that incomparable

said they, "*est ars boni et æqui;*" and Ulpian precisely in this spirit demands of jurists, as the priests of justice, that they should make men not only just externally, but also good internally.[a] The *science of law* was therefore defined as "*divinarum atque humanarum rerum notitia, justi atque injusti scientia*;"[b] and *justice*[c] consisted not merely in an outward conformity with the law, but in a conduct that agreed with the precepts of the law from internal disposition and free volition.*

not so strictly drawn as that of the modern jurists, and they never maintained that compulsion was the criterion of law. Hence they introduced into the doctrine of *law* these three general principles ("Juris præcepta sunt hæc"): "honeste vivere, neminem lædere, suum cuique tribuere." § 3. J. 1. 1.—fr. 10. § 1. D. 1. 1.—*Donelli* Comm. jur. civ. lib. 2. c. 1.—*Welcker*, Letzte Gründe. p. 482. and in his jur. Encycl. p. 93.—*Burchardi*, Grundzüge des Rechtssystems der Römer. p. 258.

(*a*) fr. 1. pr. § 1. D. 1. 1.—*Welcker*, Letzte Gründe. p. 476. and in his Encycl. p. 70.—*Elvers*, Beiträge zur Rechtslehre und Rechtswissenschaft. Vol. 1. p. 65.—*Göschel*, Zerstreute Blätter. Vol. 1. p. 118.

(*b*) § 1. J. 1. 1.—fr. 10. § 2. D. 1. 1.—fr. 2. D. 1. 3.—const. 1. § 1. C. 1. 17.

(*c*) pr. J. 1.—fr. 10. pr. D. 1. 1. "Justitia est constans et perpetua *voluntas* jus suum cuique tribuendi." Nov. 69. præf.—*Cicero* de finib. lib. 5. c. 23.—*Cicero* de invent. lib. 2. c. 54.—*Gellius*, Noct. Atticæ. lib. 17. c. 5.—*Van der Feltz*, Observat. quædam ad definitionem justitiæ Ulpiani in L. 10. pr. D. de justitia et jure. Groningen, 1806.

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genius—whether we regard his depth of knowledge, his acuteness of perception, or his able mode of treatment—the late Prof. *Thibaut*. His system, which is held in the highest esteem by the courts and by all the more enlightened practitioners, although a thorn in the side of the adherents of the historical school, and although by some considered inconvenient for use on account of its comprehensive brevity, will transmit to the latest posterity the fame of this unequalled master of the Roman law, and will ever constitute an inexhaustible source of instruction, both for students and practitioners. The applicability of the main principles of the private law, by way of analogy, to almost all branches of the law, renders it so much the more important to obtain a comprehensive view of the general part of the private law; and the Editor thinks that this reason alone should suffice to silence all those unjust and unreasonable complaints that are made in certain quarters respecting the extent given by Thibaut to the General Part—objections which he has most ably refuted in the last edition of his System (§ 3).

* The idea that the power of enforcing obedience was regarded by the Romans not essentially necessary to a law, is nothing more than a learned fancy. Where the ability to compel is wanting, no law exists. Moral duties were never regarded as identic with juridical by the Roman jurists. True fundamental views of a system of law cannot be obtained from a few passages containing the general definitions or reasonings of a single jurist or even legislator: such results can be attained only by examining the details of the legal principles themselves. These observations apply with especial force to the Roman law, the weak point of which is definition. Still many civilians, even of later times, have suffered hints in the decisions of the Roman jurists that point to the connexion between law and morals, to mislead them into regarding the latter as the predominant element of the law. But such so-called general legal views of the Romans are by no means to be found specially applied in the construction of their system of law; and in fact, by removing the power to enforce obedience, every thing would evidently be left to the mere dictates of free will. The definitions quoted in the text prove nothing further than that philanthrophic views and pedantic exaggerations have caused these ideas to be pushed further than their nature warrants. But teachers of law should not make such ill-founded speculations a subject of praise: they should rather consider it a duty to expose their erroneousness and worthlessness. All that we can say is, that the Romans, in their elevated ideas of morality, added in some cases a legal sanction to certain moral duties (e. g. the love of relations, gratitude, natural obligation, &c.) which they found equally observed by all good men. This they did in order that the exercise of such duties might no longer be left to individual conscience alone, but that those who violated them might be compelled to their fulfilment by the earthly

II. Divisions of Jus.

§ 113. 1. ***Jus publicum et jus privatum.***—With regard to its object, the Romans divided the law into *public* and *private*: "JUS PUBLICUM *est quod ad statum rei Romanæ;* JUS PRIVATUM *est quod ad singulorum utilitatem spectat.*"[a]

(*a*) § 4. J. 1. 1.—fr. 1. § 2. D. 1. 1.—"Privatum jus tripartitum est; collectum etenim est *ex naturalibus præceptis*, aut *gentium*, aut *civilibus*."—*Hugo*, Naturrecht. § 16.—*Welcker*, Letzte Gründe. p. 498. 515. and in his Encycl. p. 88.—*Friesleben*, Beiträge zur Röm. Rechtsgesch. Part 1. p. 104.—*Heineccii* Elem. jur. civ. sec. ord. Inst. Gott. 1787. § 33.

judge. And in fact, in a state that has a republican constitution, the moral element in the law needs every protection, more than in any other. In a state ruled by a monarch, the concentrated executive power of the government offers, it must be owned, a firm support to order and law, however that law may be constituted. But in a democracy, where the observance of law and order depends not so much on the power of the government as on the voluntary consent, the personal character, and the love of justice of its citizens, it is of greater importance that morality, as determined from the general conduct of virtuous persons, should be invested with the character of law, wherever the voluntary observance of it is seen to be seriously endangered. Yet, as a general rule, the line of demarcation betwixt law and ethics must be strictly observed, and internal actions must not be made the objects of law. This doctrine was fully recognised by the Romans; whence the maxim, *interna non curat prætor*. When this fundamental distinction is violated, a door is opened at once to the most injurious and arbitrary invasions of the rights of individuals by the ruling power; and in general, wherever the judicial power is allowed to encroach too far on the widely extended domain of moral duties, it is in danger of becoming inconsistent and unjust.

If, after these preliminary observations, we proceed to a closer examination of the two definitions of *legal science* contained in the text, it will be perceived, that they are both of them decidedly inaccurate. "*Jus est ars boni et æqui.*" Were this to be taken literally, then jurisprudence would be the science of morals! Now it is true, that in ancient times the prætor was empowered to decide, from reasons of honestas, pietas, and æquitas, contrary to the rigour of the law. But the observance of morality was not thereby made the principal object; for in general, the law itself still constituted the rule. In fact, this was no other than the natural effect of such advancement in morality and intellectual culture as is exhibited in the ameliorations gradually introduced by every people into the practice of their law, for the purpose of softening its original severity; and herein the Romans did not set out from any abstract *a priori* views, but simply applied to practice the results they had obtained by experience from the actions of virtuous men. We have also to consider, that under the emperors this principle was so limited, as to allow the judge to take these moral reasons into account only in such cases and in so far as was expressly admitted by the law. Now it is clear that there is no municipal law in the world that does not permit the judge to take cognizance of moral obligations to a certain well defined extent. But if we take the phrase, *bonum et æquum*, to signify *equity* simply, which, as the sources prove (comp. *Albrecht's* Römische Aequitas. Dresden & Leipsic, 1834. p. 24), it very frequently does, it is evident that jurisprudence must comprehend more than this—that this can form only a part of the science, and that too only within the limits prescribed to it by the law. But such a limitation is not given in the definition; and hence the passage has occasioned a great deal of trouble to interpreters. Möser (in his Patriotische Phantasien, Vol. 1. p. 297) takes *bonum* to denote *id quod convenit fini societatis*, and *æquum* as signifying *id quod cum minimo damno sociorum obtinetur*. Pancirola (Thesaurus, Leyden, 1617. Lib. II. cap. 1.) speaks of the necessity of *æquitas* to prevent the injustice with which the application of general laws might be attended in particular instances. But, however the passage in question is to be understood, so much is certain, that here a definition is given not of the law itself, but of the ideal to which it should strive to approximate as closely as possible, both in theory and practice; and to neglect this obvious distinction, is as unrea-

2. *Jus naturale, gentium, et civile.*—The private law was again divided into *jus naturale, gentium*, and *civile.*[a] *Jus naturale* was the name given to that law which is derived from the animal nature of man, and from those instincts which he has in common with the brute creation.[b] *Jus gentium* denoted that law which is founded upon the rational nature of man, and which on this account was recognised by all the civilized nations of their time.[c] By *jus civile* they understood that part of the private law which was established by the state, and the

(*a*) pr. J. 1. 2.—fr. 1. § 3. D. 1. 1. "*Jus naturale est, quod natura omnia animalia docuit.* Nam jus istud non humani generis proprium, sed omnium animalium, quæ in terra, quæ in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminæ conjunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio. Videmus enim cætera quoque animalia, feras etiam, istius juris peritia censeri." Comp. *Hugo*, Naturrecht. § 38.—*Cicero* de invent. 2. 22.

(*b*) § 1. J. 2.—fr. 9. D. 1. 1. "*Jus gentium est quod naturalis ratio inter omnes homines constituit*; id apud omnes peræque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utuntur." Comp. fr. 1. § 4. fr. 2. 3. 4. 5. D. 1. 1.—*Cicero* de off. 3. 5. *Theophil.* ad Inst. 1. 2.—Although the *jus gentium* is sometimes called by the Romans "*jus naturale*," e. g. in § 11. J. 1. 2.—§ 11. J. 2. 1.; yet they did not understand by it what we term the "law of nature," but rather an abstract from the *positive* laws of all nations. *Renemann* indeed, with many others, entertains a different opinion; see his work De jure gentium a jure naturali non diverso. Utrecht, 1818. But see contra, *Steinacker*, Apologia Ulpiani, sive de notione juris gentium a jure naturali accurate distinguenda. Leipsic, 1821. —*Baumbach*, Einleitung in das Naturrecht. p. 91–101.—*Dirksen* in the Rhein. Mus. Vol. 1. p. 1.—*Puchta*, Das Gewohnheitsrecht. Vol. 1. p. 1–44.—*Schultze*, Staatswissenschaft der Römer. p. 303 seqq.—*Höpfner*, Commentar. 8th Edit. § 30.

(*c*) fr. 9. D. 1. 1. "Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur. Nam *quod quisque populus ipse sibi jus constituit*, id ipsius proprium civitatis est, vocaturque *jus civile.*" § 1. 2. J. 1. 2.—fr. 6. pr. D. 1. 1. "Jus civile est, *quod neque in totum a naturali vel gentium recedit, nec per omnia ei servit*: itaque cum aliquid addimus vel detrahimus juri communi, jus proprium id est civile efficimus.—*Gaius*, 1. 1. Comp. also § 11. J. 1. 2.—Concerning the other significations of *jus civile*, see above, § 34. note *k*.

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sonable as if one were to give as a definition of one of the plastic arts, a description of that nature which it designs to imitate.

No less erroneous is the definition, "*Jurisprudentia est omnium rerum humanarum atque divinarum notitia, justi atque injusti scientia.*" In fact the Roman jurists, with all their unequalled sagacity and their admirable skill in the application of principles to practical cases, show in general no philosophical power of abstraction equal or even comparable to that exhibited by modern civilians. The advocates of the Roman definition given above understand by *res divinæ et humanæ* the divine law (*jus augurale, feciale*, and *pontificium*) and the human. But to this we have to object, that "*res*" means *every thing*, and is nowhere used in the sense of *jus*; and that even were we to understand by the first part of the definition the *jus divinum et humanum*, we would have to consider the second part ("*justi atque injusti scientia*") as a mere superfluous repetition, expressing the same idea in other words. We concur therefore in the opinion of those who take the words "*res divinæ et humanæ*" to mean, according to the Roman usus loquendi, *all things worthy of human investigation and knowledge*. Such is the definition given of philosophy by Cicero and other Roman classical writers; and as philosophy was considered to form a part of jurisprudence, the jurists transferred it to their science also; but with no more right, it would appear, than any other scientific profession would have to lay claim to it.

The definition of *justice* is also untenable, except it be understood in the sense given to it by Mackeldey, namely as a mode of action in voluntary accordance with the precepts of the law. For generally speaking, the motives of actions do not come under juridical consideration: and certainly nothing further can be required in a juridical point of view, than a voluntary course of action in conformity with the law; and every one must be regarded as just in the eye of the law, who performs all the duties it prescribes, of his own free will.

enactments of which, according to Ulpian, neither totally deviate from the *jus naturale* and *jus gentium*, nor entirely follow them; but which sometimes add to, and sometimes subtract from them.[a]—Hence in the *jus naturale*, man is regarded as an animal; in the *jus gentium*, as a rational being; and in the *jus civile*, as a member of an individual community.

3. *Jus scriptum et non scriptum.*—The jus civile, as above defined, was subdivided into *jus scriptum* and *non scriptum*.[b] The term *jus scriptum* was most commonly employed in its grammatical sense; and by it accordingly was understood all law that was actually committed to writing, whether it had originated by enactment or by custom, in contradistinction to such parts of the law of custom as were not committed to writing. At the present day, we understand by *jus scriptum*, laws only; and by *jus non scriptum*, customs, without regard to whether they are actually written or not (§ 5).*

System of the Roman Private Law.

§ 114. The system followed in Gaius's Institutes (which treat in the first book *de personis*; in the second and third, *de rebus* and *obligationibus*; and in the fourth, *de actionibus*) was retained in the Institutes of Justinian, with this exception only, that the exposition of the *obligationes* was extended to the sixth title of the fourth book. The Romans originally understood by the term *res*, nothing but *corpora* (corporeal things); but afterwards this term comprehended also *jura* and *obligationes*, which were regarded as *res incorporales*. This is the reason why they divided the private law into two principal parts, viz. the *jus personarum* and *jus rerum*; and appended to these a third part, or the *jus actionum*, for the purpose of explaining the judicial application of the two former.[c] This arrangement, it must be owned, is not strictly logical: for the *actiones*, which thus form the third part of the Institutes, belong to things as much as do the *obligationes*: and the *obligationes*, which are treated under the head of incorporeal things, and are thus presented only as an accessory part of the *jus rerum*, ought, on account of the material difference between them and real rights, to be considered and treated as a principal part of the law in themselves.

(*a*) § 3. J. 1. 2.—fr 6. § 1. D. 1. 1.

(*b*) Hence among the Romans the *edicta prætorum* and *responsa prudentum* belonged to the jus scriptum. § 3–9. J. 1. 2.—*Thibaut*, Vers. Vol. 1. No. 7.

(*c*) *Gaius*, 1. 8.—§ 12. J. 1. 5.—*Theophilus*, ad pr. J. 1. 3., ad pr. J. 2. 1., ad pr. J. 3. 13. ad pr. J. 4. 6.—Comp. also *Böcking*, Institutionen. § 28.—*Braun*, Erörterungen. p. 13 seqq.

* The term *jus publicum* is employed in a twofold sense. It denotes either: 1. the public law of a state; or, 2. the law of nations (*jus gentium*, according to the modern application of the term). The Romans used the term *jus publicum*, in the sense first mentioned, and sometimes also to signify all those ordinances of the private law which

Modern Systems.

§ 115. The system observed in the Institutes has accordingly been abandoned by modern civilians, who, although they differ more or less with regard to details, agree in the main in constructing a system of the Roman private law similar to that adopted in this Compendium. According to this system, the Roman private law is divided into:

1. Real rights, or rights of things;
2. Rights of obligation, or rights to actions on the part of others;
3. Family rights, or rights over the persons of others;
4. Rights of inheritance.

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were placed beyond the power of arbitrary change by citizens in their private transactions (*jus publicum privatorum pactis mutari non potest*).

Jus naturale was the name given by the Romans to the instinctive laws prescribed by nature itself, or the sum of those legal prescripts which apply to such relations and acts as are common to all living creatures, and proceed from the instincts implanted in them, as e. g. the union of the sexes, the impulse to self-defence, &c. In contradistinction to these, they applied the term *jus gentium* to all law that was derived from natural reason and equity, and was consequently recognised among all nations. Thus *religio erga deos, pietas erga parentes*, property, slavery, manumission, &c. are called by them topics of the *jus gentium;* either because they spring from natural reason and equity, or because they were found to be observed among all nations. *Jus civile*, on the contrary, embraced only such legal rules as were peculiar to the Romans, as e. g. those respecting matrimony, paternal authority, certain contracts, &c.

SECOND DIVISION.

OF PERSONS.*

General Definition.

§ 116. The word *person*, in its ordinary acceptation, denotes a human being who has a capacity for rights;[a] but when used as a legal term, it has a more extensive meaning, and includes all that possesses an individual capacity for rights. On this extension is founded the division into *physical* and *moral* persons; the latter of which are more appropriately called *juridical* or *fictitious* persons.[b]

Different Capacities united in one Person.[c]

§ 117. The word *persona* is sometimes used to signify merely the capacity from which special rights and duties arise.[d] A man may therefore unite in himself several such capacities (*unus homo plures sustinere potest personas*), with respect to which his rights and duties will be different.† In such case his conduct is to be judged according to the capacity in which he acts, and what he does in one capacity cannot be prejudicial to him in another;[e] but then on the other hand, the advantages which he enjoys in one capacity cannot be transferred to rights which he has in another.[f]

(*a*) According to the law of nature, every man, as a rational being, has a capacity for rights, and is consequently a person. The positive law, however, may deviate from this. Thus for instance, according to the Roman law, the slave was incapable of rights, and therefore not regarded as a person. § 4. J. 1. 16.—*Theophilus* ad § 2. J. 2. 14.

(*b*) The Roman law sometimes denotes a physical person by the term "*persona singularis*," in contradistinction to *collegium*, *corpus*, or *curia*. fr. 9. § 1. D. 4. 2.

(*c*) *Hert* de uno homine plures sustinente personas; in his Opusc. Vol. 1. Part 3. p. 27.

(*d*) In this respect a distinction is also made between *persona publica* and *privata*. § 5. J. 1. 20.

(*e*) E. g. § 4. J. 2. 18.—fr. 3. D. 1. 7.—const. 26. C. 5. 37.

(*f*) E. g. fr. 38. D. 4. 4.—const. 2. C. 2. 29.

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* The Romans made a distinction between *homo* and *persona*: because they regarded slaves not as subjects of rights, but as objects of rights, in the same manner as things. Their positive laws applied the term *person* to such men only as had the capacity for rights, and at the same time extended it to all those things and corporations which are regarded as subjects of rights, as e. g. churches, piæ causæ, municipalities, &c.

† Every one, therefore, may exercise the whole of the rights connected with his different capacities, in so far as they do not conflict with each other. And he needs not allow what he does in one capacity to prejudice him in another: thus, for instance, if he vote in the negative as guardian of a minor who is a member of a community, he may give his voice in the affirmative when voting in his own proper right. Or suppose a guardian receives by his father's will a legacy for his ward, but he himself is neglected in the testament; he can doubtless attack the will by the *querela inofficiosi*. This last instance is taken from § 4. J. 2. 18.

CHAPTER I.

PHYSICAL PERSONS.

I. Capacity for Rights in general.

§ 118. By the term *physical person* is understood a single human being who possesses a capacity for rights. A man's capacity for rights consists in his having those qualities which are necessary in order to hold or acquire rights. This capacity for rights may be divided into natural and civil. To constitute a *natural* capacity for rights, it is requisite simply that one should be a *man*. The Roman law regards as a man (*homo*) only that being born of a woman, which has a human form; and he is considered to have that form even though his body be defectively shaped (*portentum, ostentum*). But if the human form be wanting, it is a monster (*monstrum*), and incapable of rights. Yet even the fœtus, where its interests are concerned, is regarded as equal to a man (*nasciturus pro jam nato habetur, si de ejus commodo agitur*).* Hence all those rights which he would have

* The fact that a child has been born alive, is to be ascertained from its movement and breathing. The *Lex Allemannorum* (Tit. 92) demands evidence of the child's having been *seen* by witnesses to widely open its eyes; the *Saxon Mirror* (Book I. art. 33) requires its voice to have been *heard* by four male and two female witnesses. According to Justinian's law, crying was not requisite (const. 3. C. 6. 29); since Justinian adopted the view of the Sabinians, that any sure sign of life was sufficient. The particular laws of several states of Germany require it, however; thus, according to the Prussian law, in order to prove the child's vitality, the witnesses must not only have been present at its birth, but must likewise have heard its voice distinctly. Vitality consists in that perfect formation and maturity of the child which are necessary to its independent existence (*partus perfectus, vitalis*). In a case of doubt, it can be decided only by the opinion of professional persons, whether it had the power of living or not. According to the Roman law, the child's capacity for existence and consequently for rights, is not to be presumed, unless the mother has gone with the child 182 days (i. e. longer than six months and a day after conception), even though the child thus prematurely born (*abortus*. false or untimely birth) be come into the world alive; because it lacks the capacity for continued existence.

A child born capable of living has moreover the rights of a man, even though it should live but for a moment. It is also worthy of remark, that in practice the opinion prevails in Germany (see *Lauterbach*, Colleg. I. 5. § 87), that the continued life of the child is presumed as soon as its vitality has been proved; for the simple reason that it is according to the ordinary course of nature. Although the fœtus, strictly speaking, still constitutes a part of the mother (*pars viscerum*), and although the capacity for rights properly originates only with a man's birth, the solicitude of the Roman law has assimilated the unborn, in respect to legal advantages, to those already born, by reserving for the former all rights that accrue to them, until their birth. Hence when a man dies and leaves his wife in a state of pregnancy, a *curator ventris* is appointed, and the wife in the meanwhile is put in possession of the inheritance. The Roman law also requires that the portions of three children be set apart for the *nasciturus*. This, however, is no longer followed; and the division of the inheritance is postponed till after the birth takes place. A father may also appoint a guardian for the *nasciturus*, in his will. As the rights of the *nasciturus* depend on its being born perfect, it follows

had or acquired, if he had been born at the time of their accruing, are retained for him until his birth.[a] But in order that he may actually acquire them, it is requisite that he be born as a man, alive, and capable of living.[b]

II. Civil Capacity for Rights among the Romans.[c]

1. *Status*—its Nature and Kinds.*

§ 119. Among the Romans, however, every man was not capable of rights, neither did every man capable of rights possess such capacity in an equal degree. The *civil capacity for rights* depended on the existence of certain civil qualifications, which were determined partly by the public and partly by the private law.

A. A qualification of this sort, which formed the indispensable requisite to the civil capacity for rights, was called by the Romans, *status* or *caput;* and of these there were three kinds: freedom, citizenship, and familia. 1. In order to be regarded as a *person*, i. e. as one having the general capacity for rights, it was necessary that a man should be *free.* Herein consisted the *status libertatis*, and to this referred the general division of men into *freemen* and *slaves.*[d] The freemen were

(*a*) fr. 7. D. 1. 5. "Qui in utero est, perinde ac si in rebus humanis esset, custoditur, *quotiens de commodis ipsius partus quæritur;* quamquam alii, antequam nascatur, nequaquam prosit."—fr. 26. D. ibid.—fr. 231. D. 50. 16.—Particular applications of these principles are contained in fr. 3. D. 48. 19.—fr. 18. D. 1. 5.—fr. 30. § 1. fr. 84. D. 29. 2.—fr. 7. § 1. D. 1. 9.—const. 1. 2. C. 6. 29.—fr. 3. D. 5. 4.—*Mallinkrodt* de statu nondum natorum. Giessen, 1782.—*Mauchardt*, Ueber die Rechte des Menschen vor seiner Geburt. Frankfort and Leipsic, 1782.—*Zimmern*, R. G. Vol. 1. § 119.

(*b*) const. 2. 3. C. 6. 29. There is no absolute principle laid down for the decision of the questions whether and when a child is to be considered as having vitality. The common opinion, it is true, requires the birth to have taken place not before the 182d day: but fr. 12. D. 1. 5. and fr. 3. § 12. D. 38. 16., from which this opinion is derived, do not refer at all to vitality; since the former passage relates only to legitimacy, and the latter to the free birth of children.—*Senffert*, Erört. Vol. 1. p. 50.—*Dähne* in Elvers's Themis. Vol. 2. p. 356. —Respecting vitality, see *Ploucquet*, Ueber die phys. Erfordernisse der Erbfähigkeit der Kinder. Tubingen, 1779.—*Metzger*, System der gerichtlichen Arzneiwissenschaft. 4th Edition. § 272–279. § 296–315.—*Henke*, Lehrbuch der gerichtlichen Medicin. (Compendium of Medical Jurisprudence.) 3d Edition. § 85–105.—*Savigny*, System. Vol. 2. p. 385.

(*c*) *Gaius*, 1. 9 seq.—*Ulpian*, tit. 1–5. Inst. I. 3–8.—Dig. 1. 5.—*Hugo*, R. G. p. 118.—*Feuerbach*, Civil. Versuche. Vol. 1. No. 5.—*Löhr* in his Mag. Vol. 4. No. 1.—*Hugo's* Civ. Mag. Vol. 4. No. 9.—*Zimmern*, R. G. Vol. 1. § 117. 118.

(*d*) *Gaius*, I. 9.—pr. J. 1. 3.—fr. 3. D. 1. 5.—*Gelderman*, Spec. ad titulum tertium libri I. Institutionum imprimis ad ejus tituli principium. Groningen, 1808.

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that a third person cannot acquire rights through the medium of the *nasciturus*, unless they have previously accrued to the latter by its birth. Primogeniture, when liable to be called in question, as in the case of twins, must be decided by the testimony of the parents and midwife, or, where this not practicable, by lot.

To the passages cited in note *b*, which contain applications of the rule, *nasciturus pro jam nato habetur*, we may add pr. J. 1. 4.

* The doctrine of the Roman *status* and *capitis deminutio* is merely a matter of legal history, without any practical value for our own times; since neither slavery nor the analogous bond-service any longer exists in Germany; and citizenship, in consequence of the total dissimilarity between the public relations of the Roman empire and of the German states, is of quite a different character. Only the Roman decisions concerning the *status familiæ* are still of authority to a certain extent.

subdivided into *freeborn* (*ingenui*) and *freedmen* (*liberti*, in relation to their patrons; and *libertini*, with regard to their class).[a] 2. He who possessed his freedom was on that account capable of all those rights which were founded on the jus naturale and jus gentium: but freedom alone did not confer a capacity for the political rights of Roman citizenship or for the private rights determined by the jus civile; for it was necessary, in order to enjoy these rights, that the freeman should also be a Roman citizen. This constituted the *status civitatis;* and to this referred the division of freemen into *cives* and *peregrini*.[b] 3. But besides freedom and citizenship, it was also necessary to the full enjoyment of the civil capacity for rights, that one should have a *familia*. The term *status familiæ*, or the phrase "*familiam habere*," was used in the Roman law in two different meanings; thus: *a*. It was applied to a *homo sui juris*, i. e. a Roman citizen who was entitled to enjoy and acquire civil rights in his own name, and to hold other persons in his power. In this respect the *status familiæ* consisted in the "*sui juris esse;*" and to this relates the division into *homines sui juris* and *alieno juri subjecti* (§ 120). *b*. It signified also agnation, i. e. that the Roman citizen belonged to a certain family as an agnate; for the enjoyment and exercise of certain family rights, especially those of guardianship and succession to an intestate, depended upon agnation.[c]

B. The relation of these three status to each other was as follows: *freedom* might exist alone and independently; *citizenship* was dependent on freedom; and again, the *familia* was dependent on citizenship. Hence, if that status was lost upon which another depended, the latter must necessarily cease with it to exist.[d]

2. Homines sui juris et alieni juris.

§ 120. A *homo sui juris*, or paterfamilias, was a man not subject to the power of another. A *homo alieni juris*, or *alieno juri subjectus*, was one who was subject to the power of another, whether he was a free-

(*a*) *Gaius*, I. 10–12.—§ 5. J. 1. 3.—fr. 5. D. 1. 5. Concerning Roman slavery, see *Heineccius*, Antiquit. jur. Rom. lib. I. tit. 3–8.—Per eum hominem, qui serviat, quemadmodum nobis acquiratur. Diss. by *Otto Göschen*. Gottingen, 1832.—Die statu liberi des Röm. Rechts by *Madai*. Halle, 1834.

(*b*) A middle rank between cives and peregrini was formed by the Latini. Respecting them, see *Savigny* in the Z. f. gesch. R. W. Vol. 5. No. 5. See also *Heineccius*, l. c. in append. lib. 1.—*Zimmern*, R. G. Vol. 1. § 123–126.—*Schultz*, Staats-Wissenschaft der Römer. § 56.—*Wangerow*, Ueber die Latini Juniani. Marburg, 1833.

(*c*) fr. 195. § 2. 4. 5. fr. 196. pr. D. 50. 16. For the meaning of the terms *familia* and *gens* in the Roman law, see *Niebuhr's* R. Gesch. Vol. 1. p. 349.—*Deiters*, Diss. de civili cognatione et familiari nexu ex jure Romano et Germanico. Bonn, 1825.—*Heiberg* de familiari Patriciorum nexu. Sleswick, 1829.

(*d*) Among the rights adherent to the general capacity of a *person*, is the right to the *actio injuriarum*, by which any attack on his person or reputation may be prosecuted. By an equitable analogy this was extended to such as did not enjoy the *status personæ*. fr. 15. § 34. 35. 44. D. 47. 10. They regarded as a consequence peculiar to the capacity of a *citizen*, the status illæsæ existimationis (§ 123).

man or not.[a] The *homo sui juris* alone could hold all rights for himself, and have others under his power; while the *homo alieni juris*, at least according to the older law, could hold and acquire rights only for him in whose power he stood, and he himself could have no power over others.[b] The power itself which a *homo sui juris* could have over others was of these three kinds: 1. *potestas*, which was either *potestas dominorum* over slaves, or *patria potestas* over children and grandchildren; 2. *manus*, or that power which the husband acquired over his wife when they were joined in the most solemn form of Roman marriage; 3. *mancipium*, a power similar to the *potestas dominorum*, which was obtained over a freeman by the person to whom he was formally sold and delivered up (mancipated); such sale and delivery being employed principally for the purposes of *emancipatio* and *datio in adoptionem*.[c] The law of Justinian retains only the *potestas dominorum* and the *patria potestas*.

3. Capitis deminutio.

§ 121. The *loss* of a status was called *capitis deminutio*. This, like the caput itself, was of three kinds:[d] 1. *capitis deminutio maxima*, when liberty was lost. With this, of course, the other two status must also cease. 2. *Capitis deminutio media*, when the right of citizenship was lost. This occasioned at the same time the loss of the *status familiæ*; but freedom remained.[e] 3. *Capitis deminutio minima*, by which was understood every change which a Roman citizen underwent with respect to his previous family relations, in consequence of either *arrogatio*,[f] *conventio uxoris in manum mariti*,[g] *emancipatio* and

(*a*) *Gaius*, I. 48–141.—*Ulpian*, tit. 4. 5.—Inst. I. 8.—Dig. 1. 6.—*Hugo*, R. G. p. 131.—*Zimmern*, R. G. Vol. 1. § 122.

(*b*) *Gaius*, II. 86–96. III. 163–167.—*Ulpian*, XIX. 18.—Inst. II. 9. III. 28.(29.) By the law of Justinian, the doctrine on this subject was so much changed, that a filiusfamilias was entitled to enjoy nearly all rights in his own name.

(*c*) Concerning *potestas*, *manus*, and *mancipium*, see in general *Gans*, Scholien zum *Gaius*. p. 138 seqq.—*Zimmern*. R. G. Vol. 1. § 226–228.—*Serrurier*, Animadversiones ad locum Gaii de potestate, manu et mancipio. Utrecht, 1828. With regard to the *patria potestas*, see below, Book 3d.; and concerning the *manus*, see *Eggers*, Ueber das Wesen und die Eigenthümlichkeiten der alt-römischen Ehe mit manus. Altona, 1833. Respecting the *mancipium*, see *Böcking*, Comm de mancipii causis. Berlin, 1826. On the self-emancipation of a debtor, see *H. A. Zachariä* de fiducia. Gotha, 1830. cap. 4.—*Savigny*, Das altrömische Schuldrecht. Berlin, 1834. p. 2–4.

(*d*) *Gaius*, I. 158–163.—*Ulpian*, XI. 10–13.—Inst. 1. 16.—Dig. IV. 5.—*Heineccii* Antiq. Rom. lib. 1. tit. 16. The principal passage on this subject is fr. 11. D. 4. 5. "*Capitis deminutionis* tria genera sunt: *maxima*, *media*, *minima*. Tria enim sunt, quæ habemus, libertatem, civitatem, familiam. Igitur, cum omnia hæc amittimus, hoc est libertatem, et civitatem, et familiam, *maximam* esse capitis deminutionem: cum vero amittimus civitatem, libertatem retinemus; *mediam* esse capitis deminutionem; cum et libertas et civitas retinetur, familia tantum mutatur; *minimam* esse capitis deminutionem constat."

(*e*) The two first kinds of *capitis deminutio* (which, taken together, Ulpian in fr. 1. § 8. D. 38. 17. also calls *c. d. magna*, in contradistinction to the third, which he terms *c. d. minor*) produced *civil death*; that is, he who forfeited his freedom or citizenship, lost at the same time *all the rights* conferred by the jus civile, in regard to which he was therefore to be considered as dead. fr. 209. D. 50. 17.—§ 1. J. 1. 12.

(*f*) fr. 3. pr. D. 4. 5.—fr. 2. § 2. fr. 40. pr. D. 1. 7.—*Seckendorf*, l. c. (p. 132. note *d*) § 25. 26.—*Buchholtz*, Jur. Abh. § 393.—*Gaius*, I. 67 seqq. II. 141–143.—§ 13. J. 1. 10.

(*g*) *Gaius*, I. 162.—III. 82–84. IV. 38.—*Ulpian*, XI. 13.

datio in adoptionem, or lastly of *datio in mancipium* and *manumissio ex mancipio*;[a] for in all these cases the former family relations of a person were changed (*"familia mutatur"*). Such a change always supposed a certain legal act, and was never effected merely by the death of another.[b] The general consequence of the *capitis deminutio minima* was that the *capite deminutus* lost the *jura familiæ* of that family to which he had previously belonged as *agnatus*;[c] but this took place without detriment to his rights of citizenship.[d]

4. Civil Reputation.

a. *In General.*

§ 122. *Reputation* consists in the esteem which a man enjoys among others on account of his personal character, and in the external acknowledgment of his worth which results therefrom. As far as such esteem and acknowledgment depend solely on the judgment of the public, it is called *natural reputation*, or good name. Different from this is *civil reputation*, which consists in a man's being a citizen of a state, so that he is entitled to all the rights and advantages which pertain to a citizen as such. Civil reputation is therefore a consequence of the quality of citizenship; and as it proceeds solely from the state, and rests on an acknowledgment made on the part of the state, it can be taken away or diminished only by the state and in accordance with the law of the state, and not by the private judgment of others as to a man's worthiness or unworthiness.[e]

(*a*) § 3. J. 1. 16.—fr. 3. § 1. D. 4. 5.—fr. 23. D. 1. 7.—And especially *Gaius*, I. 162. "Minima capitis deminutio est cum et civitas et libertas retinetur, sed status hominis commutatur, quod accidit in his qui adoptantur: item in his qui coëmtionem faciunt: et in his *qui mancipio dantur, quique ex mancipatione manumittuntur; adeo quidem ut quotiens quisque mancipetur aut manumittatur totiens capite deminuatur.* Comp. *Gaius*, II. 141.

(*b*) He who became homo sui juris in consequence of the death of the paterfamilias, suffered no capitis deminutio, and therefore did not lose his *agnatio*.

(*c*) fr. 7. D. 4. 5.—fr. 4. § 10. D. 38. 10.—fr. 11. D. 38. 16.—fr. 6. § 1. D. 37. 1.—*Ulpian*, XI. 9.—*Gaius*, I. 158. 163. In all these passages it is said, "jus agnationis perimitur s. corrumpitur." This was the immediate consequence of every cap. dem. minima, and was in fact the true object of the contrivance.

(*d*) So says Ulpian, XI. 13. "Minima capitis deminutio est, per quam, et civitate et libertate salva, *status duntaxat hominis mutatur*." The same language is used by Gaius. I. 162. and in 3. J. 1. 16. Paulus also says in fr. 11. D. 4. 5. "Cum et libertas et civitas retinetur, *familia tantum mutatur*, minimam esse capitis deminutionem constat." It may be worthy of notice that the term "mutatur" only, and never "amittitur," is applied to the loss of the status familiæ; for every capitis deminutio minima effects merely a change of family, and consists in one's separating from the family to which he belonged, and connecting himself with another family, or establishing one himself. This was the case with the *emancipatus*. Comp. *Conradi* de minima capitis deminutione; in his Parerga lib. 2. p. 163. — *Gmelin*, Diss. on the same subject. Tubingen, 1807.—*De Coll*, Diss. de cap. dem. min. juris antiqui. Jena, 1810.—*Deiters*, l. c. § 22.—*Du Caurroy* in the Thémis. Vol. 3. p. 171.—*Seckendorff*, Diss. de capitis deminutione minima. Cologne, 1828.—*Zimmern*, R. G. Vol. 1. § 229.—*Simson*, ad Dig. de capite minutis IV. 5. L. 11. Exercit. Konigsberg, 1835. This author is of opinion that very little of the doctrine of *c. d. minima* is applicable under the later law.

(*e*) Comp. fr. 5. § 1. D. 50. 13.

b. According to the Roman Law *

§ 123. The civil reputation[a] which belonged to the Roman citizen as such, was called *existimatio;* and he whose reputation was inviolate was said to be in the *status illæsæ existimationis.*[b] This status was a condition of the perfect capacity or rather worthiness of the Roman citizen for the enjoyment of all political and civil rights, as determined by the Roman public and private law. Now the *existimatio* might be either diminished or entirely lost.

A. It was entirely *lost* (*existimatio consumitur*), when a citizen suffered the *capitis deminutio maxima* and *media;* since he thereby lost his citizenship, which was the condition of all *existimatio.*[c]

(*a*) *Donelli*, Comm. lib. 18. c. 6.—*Hagemeister* in Hugo's Civ. Mag. Vol. 3. No. 8.—*Thomasii* Diss. de existimat. fama et infam. Halle, 1734.—*Burchardi* de infamia ex disciplina Romanorum. Kiel, 1819.—*Walter*, Ueber Ehre und Injurien nach Röm. Recht, in the Archiv Crim. R. Vol. 4. No. 1.—*Van Geuns*, Diss. de infamia legibus Romanis constituta. Utrecht, 1823.—*Marezoll*, Ueber die bürgerliche Ehre. Giessen, 1824.—*Molitor*, Diss. de minut existimatione ex jure Romano. Louvain, 1824.—*Zimmern*, R. G. Vol. 1. § 127–129.—*Welcker*, Jurist. Encyclop. p. 244 seqq.

(*b*) fr. 5. § 1. D. 50. 13. "*Existimatio* et dignitatis illæsæ status, legibus ac moribus comprobatus, qui ex delicto nostro auctoritate legum aut *minuitur* aut *consumitur*." Every person enjoyed the right to the *actio injuriarum*, as a remedy against an attack; but the status illæsæ existimationis was dependent on the right of citizenship.

(*c*) fr. 5. § 2. 3. D. ibid. Comp. § 121. note *e.* p. 131.

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* The Roman doctrine of *infamy* admits of only a partial application in Germany; since the views respecting honour which prevail at the present day, are totally different from those that were entertained by the Romans. Freedom has nothing to do with the capacity for rights. Infamy, in its modern acceptation, consists in the disgrace that arises from a deprivation of the political rights of citizenship, and in the disqualification for public offices of trust and honour; and connected therewith are several disabilities specially defined by law, which affect even private rights. Infamy of this kind, as well as every other criminal punishment, presupposes in all cases a judicial investigation and a judgment. An *infamia juris immediata* therefore, according to the Roman law, does not exist in Germany. The only resemblance to it is found in cases where infamy is an implied legal consequence of a punishment decreed. According to modern views, the mere opinions of individuals cannot produce infamy, or diminish the full use and enjoyment of the private rights of any citizen. The prejudices moreover which the Romans entertained against certain classes and vocations, e. g. those of play-actors and gladiators, are now no longer regarded. So too, infamy is no longer connected with such offences against society (e. g. *stupra*, &c.) as are now subject to the jurisdiction of the police. The punishment of infamy inflicted on widows for violating their year of mourning, has been altogether abolished by the canon law, as too severe. "Non omnes fiunt infames lege canonum," says Gratian ad can. 7. C. 2. qu. 4., "quos leges seculi infames pronunciant. Quod etiam de ea fateri cogimur, quæ intra tempus luctus nubit: *cum matrimonia hodie regnantur jure poli, non jure fori;* et jure poli (1 Corinthians, cap. 7. v. 39.) mortuo viro mulier soluta est a lege viri, et nubat cui vult." An infamous person loses his political but not his private rights; his capacity for the enjoyment of private rights remaining undiminished, except that his credibility as a witness is impaired in proportion to the badness of his character, which in some cases, as in that of one convicted of perjury, may render him entirely incompetent. But as the passing over of one's own brothers and sisters and devising an inheritance to a persona turpis is declared to be an invalid act, so this objection applies with additional force to the bestowing of an inheritance upon an infamous person.

B. When it was merely *diminished* (*existimatio minuitur*), it occasioned the loss of only some of the rights of citizenship.[a] The following persons were not in the full enjoyment of civil reputation:

1. Those who, on account of their infamous trade or the commission of a crime, were expressly designated, either by the prætorian Edict or by a law, to be such as did not deserve the reputation to which they would otherwise have been entitled; hence they were called *infames quos lex notavit*, or *qui infamia notati sunt*.[b] This is termed by the modern jurists, *infamia juris*. A distinction also was made between *infamia juris immediata* and *mediata*. *a*. In some cases it was said, *notatur qui fecerit*, that is, the infamy ensued as soon as it was certain that one had committed the infamous action or taken up the infamous trade; and this without any previous judicial investigation and condemnation (so-called *infamia juris immediata*). To this class belonged actors and gladiators;[c] procurers and pro-curesses;[d] public courtezans[e] and males that gave themselves up to pederasty;[f] persons that were of age who violated a compromise voluntarily entered into and confirmed by oath;[g] usurers;[h] those who were betrothed or married to several at the same time;[i] widows who married again before the expiration of their year of mourning;[k] guardians who, before their wards came of age, either married them themselves or gave them in marriage to their sons, in which case the latter also became *infames*;[l] wives guilty of adultery and caught in the act;[m] insolvent debtors who did not voluntarily surrender their property to their creditors, but obliged them to resort to legal measures to obtain it (*missio in bona*);[n] and lastly, soldiers who were dismissed the service *ignominiæ causa*.[o] *b*. In other cases it was said, *notatur qui damnatus erit*, that is, the infamy arose only in consequence of condemnation for a crime or of the punishment inflicted (s. c. *infamia juris mediata*). This was the case with all *delicta publica ordinaria* and with some *extraordinaria*;[p] and also with some *delicta privata*, especially *furtum*, *rapina*, and *injuria*, in which he also became infamous who made a compromise with the injured party, in order to prevent him from bringing forward his accu-

(*a*) Of political rights: see fr. 1. pr. D. 48, 7. —fr. 40. D. 47. 10.—const. 2. 12. C. 12. 1.—fr. 1. § 5. 6. D. 3. 1.—fr. 4. D. 47. 23.—fr. 4. 8. D. 48. 2.—fr. 1. 2. D. 1. 22. Of private rights: see fr. 18. § 1. fr. 20. § 5. fr. 26. D. 28. 1.—fr. 14. 15. D. 22. 5.—fr. 44. D. 23. 2.—const. 27. C. 3. 28.

(*b*) Dig. 3. 2.—Cod. 2. 12.—*Glück*, Comm. Vol. 5. § 374 seqq.—*Göschen*, Grundriss zu Pand. Vorl. p. 31–65.

(*c*) fr. 1. § 6. D. 3. 1.—fr. 1. fr. 2. § ult. fr. 3. D. 3. 2.

(*d*) fr. 1. fr. 4. § 2. 3. D. 3. 2.—fr. 43. § 6–9. D. 23. 2.

(*e*) fr. 24. D. 3. 2.—fr. 41. pr. fr. 43. pr. § 1–5. D. 23. 2.

(*f*) fr. 1. § 6. D. 3. 1.—const. 31. C. 9. 9.

(*g*) const. 41. C. 2. 4.

(*h*) const. 20. C. 2. 12.

(*i*) fr. 1. fr. 13. § 1–4. D. 3. 2.—const. 2. C. 5. 5.—const. 18. C. 9. 9.

(*k*) fr. 1. fr. 11. § ult. fr. 12. fr. 13. pr. D 3. 2.—const. 2. C. 5. 9.

(*l*) fr. 66. pr. D. 23. 2.—const. 7. C. 5. 6.

(*m*) fr. 43. § 12. 13. D. 23. 2.

(*n*) const. 11. C. 2. 12.—const. 8. C. 7. 71.

(*o*) fr. 1. fr. 2. pr. § 1–4. D. 3. 2.—const. 3. C. 12. 36.

sation ;[a] lastly, infamy arose when one was condemned on account of *dolus*, in certain contracts that imply especial personal confidence, as *mandatum*, *depositum*, *societas*, and *tutela*.[b]

2. Those persons who by *vitæ turpitudo*, i. e. an evil course of life or a low trade, on which however the laws had not fixed the stigma of infamy, had forfeited their natural reputation, and thus rendered themselves unworthy of the full enjoyment of civil reputation. Modern jurists apply to this condition the term *infamia facti*.[c] Its effects, at least according to the later law, were almost equally prejudicial with those of the *infamia juris*.[d]

3. Those persons who, according to the views of the Romans, laboured under a *levis nota*, namely, freedmen and the children of those *qui artem ludicram faciebant*. The effect of the *levis nota* was, that senators and their children could not lawfully contract marriage with a person thus marked, and that the latter could not be made the heir of a testator in preference to his brothers and sisters.[e] All those persons whose natural or civil reputation was not unblemished, were embraced under the general term, *personæ turpes*.[f]

III. Other Distinctions between men.

§ 124. Besides the general qualities just mentioned (§§118–1123), upon which the natural and civil capacity for rights depended according to the Roman law, there are many other qualities and relations to be considered, upon which certain special rights depend, or which at least exercise an influence upon rights. For this reason it is better not to apply the term *status*, as is still frequently done,[g] to qualities of this

(*a*) fr. 1. D. 3. 2.—fr. 7. D. 48. 1.—fr. 1. 4. D. 47. 15.—fr. 1. fr. 3. pr. D. 47. 12.—fr. 2. D. 47. 10.—fr. 4. § 4. D. 3. 2.—const. 12. C. 2. 12.

(*b*) § 2. J. 4. 16.—fr. 1. fr. 4. § 5. D. 3. 2.—fr. 7. D. 48. 1.

(*c*) § 2. J. 4. 16.—fr. 1. fr. 6. § 5. 7. D. 3. 2.—fr. 56. D. 17. 2. *Culpa* did not produce infamy, § 6. J. 1. 36.—fr. 3. § 18. fr. 4. § 1. 2. D. 26. 10.—const. 9. C. 5. 43.

(*d*) fr. 3. pr. D. 22. 5.—fr. 2. D. 37. 15.—fr. 12. D. 50. 2.—const. 2. C. 12. 1.—const. 27. C. 3. 28.

(*e*) *Ulpian*, XIII. XVI. 2.—fr. 44. pr. § 5. D. 23. 2.—fr. 5. D. 40. 11.—const. 27. C. 3. 28.—*Heineccius* de levis notæ macula. Halle, 1720. and in his Opusc. p. 266. The use of the term *levis notæ macula* arose from a misunderstanding of const. 17. cit., where the word "*macula*" refers not merely, as has been supposed, to "*levis notæ*," but also to "*infamiæ*" and "*turpitudinis*."

(*f*) The *infamia juris*, as Rosshirt adds here, appears to have had no practical effect in the private law, except in proceedings before the courts. The *turpitudo* (which included the *infamia juris*) had reference principally to the *querela inofficiosi*. In Germany the Roman doctrine of *infamia juris* is considered inapplicable, on account of its connexion with the Roman proceedings and public law, neither of which have been adopted in that country.

(*g*) The modern jurists understand by *status hominis*, all those qualities upon which special rights depend. They make a distinction between status *naturalis* and *civilis* : by the former, they understand the natural capacity for rights (§ 118), and other physical qualities which have an influence upon rights, as for instance sex, age, and health ; and by the term *status civilis* they denote the civil capacity for rights, especially the three Roman *status* (§ 119), and some other civil qualities which affect one's rights, as for instance reputation, religion, rank, and profession.—See *Westenberg* princ. D. L. 1. Tit. 5. § 4 seqq.—*Hellfeld*, Jurisprud. for. § 111.—*Höpfner*, Comm. Edit. by Weber. 8th ed. § 62.—*Thibaut*, System. § 207. But this division of the *status* is not found in the Roman law. See *Feuerbach*, Civ. Vers. No. 6.—*Zimmern*, R. G. Vol. 1. § 117 seqq.

description; for *status*, in the restricted and proper sense in which it was used by the Romans, refers only to the civil capacity for rights. In examining the other personal qualities and relations, we shall here confine ourselves to those that were regarded as most important.

1. With respect to Sex.

§ 125. With respect to *sex*, persons are either *males* or *females*. It is commonly admitted that there may be another class whose sex is doubtful, viz. *hermaphrodites;* should such a case occur, it must be considered to belong to that sex to which the person bears the greatest resemblance.[a] As a general rule, both sexes have equal rights; but this is subject to many exceptions.[b]

2. With respect to Age.[c]

§ 126. With respect to *age*, persons are either *majors* or *minors* (*majores aut minores XXV annis*).[d] A *major* is one who has attained the age of twenty-five years, without distinction as to sex.[e] *Minors* are either *adults* (*puberes, adulti, adolescentes*) or *children* (*impuberes*).[f] Males become adult after the age of fourteen; females on completing their twelfth year.[g] Children before their seventh year are termed *infants* (*infantes*),[h] without distinction of sex. From the seventh year to the age of puberty, they are called either *infantiæ* or *pubertati proximi*,[i] according as they are nearer to the age of infancy or puberty.[k] *Old age*, which relieves from the charge of public duties, begins with the completion of the seventieth year.[l]

(*a*) fr. 10. D. 1. 5. "Quæritur, hermaphroditum cui comparamus? et magis puto ejus sexus æstimandum, qui in eo prevalet." in fr. 15. § 1. D. 22. 5. "Hermaphroditus an ad testamentum adhiberi possit, qualitas sexus incalescentis ostendit."—*Metzger*, Gerichtliche Arzneiwissenschaft (Medical Jurisprudence). 4th Ed. § 543 seqq.—*Cocceii* jus contr. lib. 1. tit. 5. qu. 3.

(*b*) fr. 9. D. 1. 5.—fr. 1. § 5. D. 3. 1.—fr. 1. 2. D. 16. 1.—fr. 16. 18. D. 26. 1.—fr. 20. § 6. D. 28. 1. § 10. J. 1. 11.

(*c*) See *Zimmern*, R. G. Vol. 1. § 120. 121. and *Gesterding*, Nachforsch. Vol. 2. No. 1.

(*d*) Ætas legitima. See *Savigny*, Ueber die lex Plætoria. Berlin, 1833.

(*e*) const. 5. C. 6. 53; yet by way of exception, minors are considered of full age in case they obtain *venia ætatis*, i. e. if they are declared by the legislator to be majors; but in order to be declared so, it is requisite that males should have attained the age of twenty years, and that females should have passed their eighteenth year.—const. 2. C. 2. 45.—*Scheffer* de venia ætatis. Strasburg, 1782.—Respecting the const. 2. here cited, see *Marezoll* in Löhr's Mag. Vol. 4. p. 397.—*Glück*, Comm. Vol. 31. p. 144 seqq.

(*f*) The impubes when a homo sui juris is called *pupillus*. fr. 239. pr. D. 50. 16. The period of impuberty is sometimes called *prima ætas;* and the period from puberty to majority, *secunda ætas*.—const. 30. C. 1. 4.—const. 10. C. 6. 26.—Nov. 72. præf.

(*g*) pr. J. 1. 22.—const. 3. C. 5. 60.—*Cramer* de pubertatis termino ex disciplina Romanorum. Kiel, 1804.—Concerning the *pubertas plena*, mentioned in § 4. J. 1. 11. fr. 40. § 1. D. 1. 7., and applications of which are found in fr. 14. § 1. D. 34. 1.—fr. 57. D. 42. 1.—Nov. 115. c. 3. § 13., see *Dirksen*, Beitr. p. 289.

(*h*) const. 8. C. *Theod.* 8. 18.—const. 18. pr. C. 6. 30.—Originally the term *infans* meant one *qui fari nondum potest*. fr. 65. § 3. D. 36. 1.—fr. 70. D. 45. 1.—const. 26. C. 8. 54.—*Unterholzner* in the Z. f. gesch. R. W. Vol. 1. No. 3.

(*i*) fr. 111. pr. D. 50. 17.—§ 10. J. 3. 19.—§ 18. J. 4. 1.—fr. 14. D. 29. 5.—*J. Gothofredus* in Comm. ad Tit. D. de R. J. ad L. 111.

(*k*) For the different opinions, see *Gensler* in the Archiv Civ. Prax. Vol. 4. p. 216. (who maintains the opinion, that as respects the accountability of children, it must depend entirely upon the degree of intellect).—*Dirksen* in the Rhein Mus. Vol. 4. p. 316. and *Rosshirt*, Entwickelung der Grundsätze des Strafrechts. p. 139 seqq.

(*l*) § 13. J. 1. 25.—fr. 2. pr. D. 27. 1.—fr. 3. D. 50. 6.—const. 10. C. 10. 31.—const. un. C.

3. With respect to Health.

§ 127. With respect to *health*, and, 1. As regards the *body*, persons are either *healthy*, or *diseased* (*morbo laborantes*),[a] or *infirm*, i. e. labouring under some permanent physical defect (*vitio laborantes*).[b] 2. As regards the *mind*, persons are either such as have the full use of their reason or such as have not. These latter, according to the kind and several degrees of their mental disease, are either *raging mad* (*furiosi*), or suffering from other kinds of derangement, as *lunatics*, who labour under an unnatural exaltation,[c] and the *insane*, who labour under an unnatural depression of mind (*mente capti, dementes, amentes*). Another class, in certain respects belonging to this division, is composed of those that are merely *silly* or *stupid* (*simplices et stupidi*).

4. With respect to Consanguinity.*

a. Definition.

§ 128. By *consanguinity* or *relationship* (*cognatio*), is meant a connexion between two or more persons founded on generation. If such

5. 68. These passages are not contradicted by const. 3. C. 10. 49., as has been supposed. See *Thibaut* in the Archiv Civ. Prax. Vol. 8. p. 74. Dr. Rosshirt adds here that *infantes* have no legal understanding, and are consequently incapable of performing a legal transaction; for this reason their father or guardian transacts for them. Children who are past infancy are so far considered to have legal intellect, that they can acquire rights by *locupletatio*; fr. 28. pr. D. 2. 14. They may also acquire possession, but cannot make a valid acceptance or discharge of payments; because this is of the nature of alienation. The *pubertati proximus*, as regards delicts, is considered capable of dolus. Minors, who were formerly protected against dolus by the Lex Lætoria, enjoyed in later times the benefit of the *restitutio in integrum*. See *Savigny*, System. Vol. 3. p. 25 seqq.

(*a*) A sickness which rendered a man incapable of attending to business, was called by the Romans *morbus sonticus*.—fr. 113. D. 50. 16.—*Buchholtz*, Jur. Abh. p. 373.

(*b*) fr. 101. § 2. D. 50. 16. To these belong also *spadones* and *castrati*.—fr. 128. D. 50. 16. —fr. 6. § ult. fr. 7. D. 21. 1.—fr. 39. § 1. D. 23. 3.—fr. 6. pr. § 1. D. 28. 2.—fr. 40. § 2. D. 1. 7.—§ 9. J. 1. 11. Likewise deaf or dumb persons or deaf mutes. § 3. J. 2. 12.—fr. 1. § ult. D. 44. 7.—fr. 1. § 3. D. 3. 1.—fr. 4. D. 29. 1.—const. 10. C. 6. 22.—*Guyot*, Diss. de jure surdo-mutorum. Groningen, 1824.

(*c*) *Cicero*, Tusc. Quæst. 3. 5. Those who have been declared prodigals by a judicial decree (prodigi quibus bonis interdictum est), are regarded as insane, so far as the administration of their estate is concerned.—fr. 1. pr. D. 27. 10.—§ 3. 4. J. 1. 23.—See below, Book 3d chap. 2d.

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* The term *direct line* (*linea recta*) denotes a single line considered *in itself*; while *collateral line* (*linea obliqua*) signifies one of several lines proceeding from the same person, considered in its relation *to the others*. Collateral lines are, with respect to one another, either *equal* (*æquales*) or *unequal* (*inæquales*). If the inequality be such that in one line the person in question stands immediately under the common ancestor, while the person in question in the other is further removed from him, the relation of such persons to each other is called *respectus parentelæ*. Accordingly, this relation exists between every descendant and the brother or sister of one of his ascendants.

Agnation, says Mackeldey, is effected through men, *cognation* through women; so that we may say, in other words, agnation is a consequence of begetting, and cognation of bearing. Hence my *agnates* are my father, my son, my brother, my daughter, my sister, my father's brother, my brother's son, &c.; my *cognates* are my mother, my grandmother, my mother's brother, my mother's sister, my sister's son, &c. The Romans were led to make this distinction between relationship through males and that through females, from a consideration of the fact, that male descendants con-

persons were actually members of the same family, or would have been so had their paterfamilias still been living, their connexion was called a *family relationship* (*agnatio*). The relationship arising from connexion by blood which is produced through the medium of females as well as males, was called *cognatio naturalis*, in opposition to *agnatio*, which was confined to descent from males. Relationship, therefore, in its strict sense, supposes a unity of blood; but in certain circumstances, persons who are not relatives, properly so called, are regarded as such from a legal point of view.[a] Hence arises the distinction between *true* or *natural*, and *civil* or *fictitious* relationship. The latter alone can be produced by adoption. At present, we have to do only with natural relationship. It may be observed, however, that *capitis deminutio* did not affect the *cognatio naturalis*, but merely the *agnatio*.[b]

b. Different Kinds.

§ 129. In cases of kindred, either the one person is descended medi-

(*a*) fr. 6. § 2. D. 38. 10. The spiritual cognation (cognatio spiritualis) which is found in the canon law, but not recognised by Protestants, arises at baptism between the baptizer and sponsor on the one hand, and the christened child and its parents on the other; but this relationship does not extend beyond these parties. A similar relationship arises from the performance of the rite of confirmation.—Decret. Gregor. IX. lib. 4. tit. 11. —Conc. Trident. Sess. 24. c. 2. de reform. matr.—*Walter*, Kirchenrecht (Ecclesiastical Law). § 324.—See also Inst. 3. 6.—Dig. 38. 10.—Decretal. Gregor. IX. lib. 4. tit. 12. 14. 17.—*Hugo*, Heutiges R. R. 7th Edit. p. 169 seqq.—*Brinkmann*, Erbfolge nach dem Code Napoleon. § 114.

(*b*) *Klenze* in the Z. f. gesch. R. W. Vol. 6. No. 1.—*Buchholtz*, Jur. Abh. No. 3.—*Höpfner*, Comm. § 191.

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tinue and increase the family of the ancestor, while females are separated by their marriage from his family, and, instead of continuing it, enter another and help to continue that. Hence the Roman proverb: "*Mulier finis familiæ est.*"

The distinction between the canonical and Roman methods of counting degrees of relationship, has reference solely to collateral consanguinity. Thus, while the Roman law, in the direct as well as in the collateral line, always numbers the whole of the generations to be taken into account for establishing a relationship between two persons; the canon law sets up the preposterous rule, that the nearness of relationship between two *collaterales* is the same as that between one of them and the common ancestor,—and should they be unequally distant, between him who is furthest off and the common ancestor. Accordingly the canon law counts but *one* of the collateral lines, and where they are unequal, the longest; the civil law, on the contrary, counts *both*. The absurdity of the canonical mode of computation—by which *two* generations are regarded as *one* degree, and the generations between one of the relatives and the common ancestor are counted, instead of those between the relatives themselves—will be perceived from its results: thus, for instance, it considers that brothers are related in the same degree to each other as they are to their father, and that cousins are as nearly related as uncle and nephew; so that in the former case the relation is in the first, and in the latter in the second degree, which is contrary to nature and common sense. In regard to the order of succession, where an exact mode of reckoning is indispensable, the computation of the canon law has never been followed in Germany; but with respect to the prohibitions of marriage between near relatives, it is still retained even in the Protestant states of that country. The influence exercised by relationship upon private rights has reference chiefly to marriage, succession, guardianship, and evidence.

Further observations on this subject are reserved for that part of the work, which treats of the doctrine of family rights and the law of inheritance. On simple and complex relationship see note * to § 133.

ately or immediately from the other, or else they derive their origin in common from a third. In the first case, the kindred are said to be related in a *direct line* (*linea recta*); and in their mutual relations they are called *ascendants* and *descendants* of one another, according as we count upwards (*linea superior s. ascendens*) or downwards (*linea inferior s. descendens*). In the second case, the kindred are said to be related in a *collateral line* (*linea transversa s. obliqua*);[a] and those who are thus related by descent from a common ancestor are called *collateral* kindred (*ex latere venientes*, in modern Latin *collaterales*).[b] The whole of the kindred descended from a common ancestor (*stipes communis*) are called a *stock* (*stirps*) or a *line*, which may again be divided into subordinate stocks or lines.

c. Degrees of Kindred.

§ 130. The nearness of relationship is reckoned by degrees. According to the mode of computation adopted in the Roman law, each generation constitutes such a degree; and upon this is founded the rule, that the number of generations between two persons determines the number of degrees between them (*tot sunt gradus quot sunt generationes*).[c] Accordingly father and son are related in the first degree, grandfather and grandson in the second, uncle and nephew in the third, cousins in the fourth, and so on.[d]

d. Legitimate and Illegitimate Kindred.

§ 131. Natural consanguinity is either *legitimate* or *illegitimate*, according as it is founded on generation in lawful marriage or on genera-

(*a*) fr. 9. fr. 10. § 9. D. ibid. The canon law distinguishes also between equal and unequal relations in the collateral line, i. e. between such as are equally and unequally distant from their common ancestor.

(*b*) const. 9. § 1. C. 5. 27.—Nov. 118. c. 2. 3. The mutual relationship of two persons, one of whom descends immediately from the common ancestor, whilst the other descends from the same ancestor in a more distant degree, is called by the later jurists *respectus parentelæ*. The Romans said of such persons: "parentum liberorumve locum obtinent." § 5. J. 1. 10. But *Dirksen*, in his Beiträge zur Kunde des Römischen Rechts, Leipsic, 1825. p. 246. has shown that this Roman expression has a more general and comprehensive meaning than the modern *respectus parentelæ*, and that it is sometimes applied to the true relation of parents and children, and sometimes to affinity and guardianship.

(*c*) The canon law follows the same principle in computing the degrees of the ascending and descending lines; but in computing the degrees of collateral relationship, it has introduced the rule, that collateral relatives are akin to each other in the same degree in which each is related to their common ancestor. cap. 2. C. 35. qu. 5. ("For the sake of greater precision" says Mackeldey, "it is usual to mention the number of degrees in both lines, in computing the distance between persons who are related in unequal collateral lines." But such a usage, if it really is followed, appears to the present Editor as utterly useless and absurd. Compare *Höpfner*, Comm. § 118.) The most remarkable among the older writings on the subject is, *Damiani* de parentelæ gradibus; in ejusdem Opp. Bassano, 1783. Vol. 3. p. 179. Among the later works, see especially *Böhmer*, Princ. jur. can. § 389.—*Glück*, Comm. Vol. 23. § 1209–10.—*Walter*, Kirchenrecht. § 241.—*Laspeyres*, Diss. canon. comp. et nupt. propter sanguinis propinq. ab ecclesia christ. prohibit. sistens historiam. Berlin, 1825. This principle of computation was adopted in the Lombardian law, which first used the more enlarged mode of computing *per gradum et parentelam*, quæ sic fit, ut ille, qui succedere vult, nominatim uniuscujusque nomina parentum suorum antecessorum dicat. —*Rosshirt*, Erbrecht. p. 479.

(*d*) fr. 1. § 3–7. r. 3. D. 38. 10.

tion without marriage. With respect to the latter class, the Roman law distinguished between: 1. *naturales*, who were begotten in concubinage, and with regard to whom paternity was assumed ;[a] and, 2. other children born out of wedlock, *spurii et vulgo quæsiti*.[b] Among the latter a distinction was made with respect to such as were the fruit of adultery (*adulterini*) and of incest (*incestuosi*). Every sexual connexion except in wedlock and concubinage was regarded as criminal (*adulterium*, in its wider signification); but the *incestuosi* were especially designated as *ex damnato coitu procreati*.

e. Collateral Consanguinity.

§ 132. Collateral consanguinity is either of the *full blood*, as when founded on descent from *the same couple*, in which case the kindred are now commonly and exclusively termed *germani*;[c] or else it is of the *half blood*, as when founded on the descent of two relatives from *a single person*, who is the only ancestor common to both. If this be the *paternal* ancestor, the collateral kindred of the half blood are now called *consanguinei* ;[d] if it be the *maternal* ancestor, they are called *uterini*.[e] In modern Latin, collateral kindred of the half blood are also called *unilaterales*, or *ex uno latere juncti*.[f]

*f. Simple and Complex Relationship.**

§ 133. Relationship is either simple or complex.[g] It is called *simple*, where persons are related to each other only in one way; and *complex*, when they are related in several ways. Such complex relationship arises when children are begotten : 1. by two persons who were them-

(*a*) The term *liberi naturales* is used in the Roman law to signify : 1. children by *concubinage*, in contradistinction to children by marriage, e. g. tit. C. de natural. liberis (5. 27.). Nov. 89. cap. 12. ; 2. children by *birth*, as distinguished from children by adoption. e. g. § 2. J. 3. 1.

(*b*) § 12. J. 1. 10.—fr. 23. D. 1. 5.

(*c*) *Hugo*, Civ. Mag. Vol. 4. Nos. 7. and 16. —*Fritz* in Linde's Z. f. Civ. R. Vol. 15. No. 1. The name *frater germanus* was applied to the natural brother, whether of the full blood or descending only from the same father; while the name *frater uterinus* was applied to the natural brother by the same mother.

(*d*) *Consanguineus* meant any agnate of the nearest degree, and accordingly applied to the brother of full blood.—§ 1. J. 3. 2.—fr. 2. pr. D. 38. 16.—*Gaius*, 3. 14.—*Hugo*, Civ. Mag. Vol. 4. p. 246.

(*e*) Step-brothers and step-sisters are not of kin to each other, for neither the step-father nor step-mother is parent in common to both. In common life, brothers and sisters of the full blood are often considered as *natural*; and those of the half blood, as *step*-brothers and sisters. But this is erroneous : for natural relationship must of course exist between those who have even one parent in common ; and, as has been already remarked, step brothers and sisters are not related at all.

(*f*) Justinian calls brothers and sisters of full blood, "ex utroque parente conjuncti," and those of half blood, "ex uno parente conjuncti sive per patrem solum sive per matrem." Nov. 118. c. 2. 3.—fr. 10. § 13. D. 38. 10.

(*g*) *Hugo*, Civ. Mag. Vol. 4. Nos. 7. 16.—*Hugo*, Lehrbuch des heutigen Römischen Rechts (Compendium of modern Roman Law). 7th Ed. p. 172. 185.—*Glück*, Von der Intestaterbfolge. 2d Edit. § 19. 39. 40. 41.—*Göschen*, Grundr. p. 38–41.

* The doctrine of complex relationship is of importance in regard to the law of inheritance, as it may sometimes entitle one person to several portions of the estate of

selves related; 2. by two persons who are both related to a third; 3. by one person in connexion with two others who were previously related; and, 4. by two persons related to each other in connexion with two other persons who were also related.[a] Complex relationship must not be confounded with the relationship of full blood, which is essentially a simple, although many regard it as a complex relationship.

5. With respect to Affinity.

a. Definition.

§ 134. By *affinity* (*affinitas*) is meant the connexion which arises by marriage between each person of the married pair and the kindred of the other.[b] It is founded upon the idea of the unity effected by marriage between the wedded couple, so that the one bears to the other's kindred a connexion similar to relationship. Affinity applies also to *step-relationship*, but only so far as one step-relation is the married partner of the other's natural relation.

(*a*) A double relationship may arise also when a civil relationship is added to the natural one; as for instance, when a grandfather adopts his grandson.

(*b*) fr. 4. § 3. D. 38. 10.—*Walter*, Kirchenrecht, § 325. The husband and wife are not affined to each other; neither are their relatives affined to each other.—*W. Sell* in the Archiv Civ. Prax. Vol. 21. No. 2.

(*b*) Step-parents and step-children are therefore affined to one another, but not step-brothers and sisters (*comprivigni*).

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adeceased relative. In order that the reader may better understand the four ways pointed out by Mackeldey in which complex relationship may arise, the Editor subjoins the following diagrams.

Fig. 1. *Fig.* 2. *Fig.* 3. *Fig.* 4.

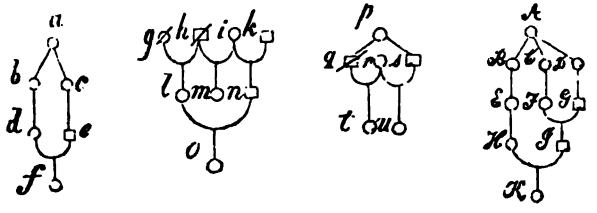

Fig. 1. When the two related persons *d* and *e* (cousins) intermarry, and beget the child *f*, then *f* and *a* are doubly related; for *f* has the blood of *a* in the first place through *b* and *d*, and again through *c* and *e*.

Fig. 2. *l* and *n* are not related to each other, since they have entirely different parents; but they are related to *m*, inasmuch as *m* is the frater uterinus of *l* and frater consanguineus of *n*. Accordingly the child *o* gotten in wedlock between *l* and *n*, is doubly related to *m*; since it receives the blood of *m* once through *h* and *l*, and again through *i* and *n*.

Fig. 3. When a person marries two relatives (sisters) one after the other, and has children by each, such children (*t* and *u*) are doubly related, since they receive the same blood through the father and through the mother.

Fig. 4. *H* and *I* are doubly related; if they beget in wedlock the child *K*, the latter is trebly related to the relatives of both parents.

b. Degrees of Affinity.

§ 135. As affinity is produced by marriage only, and not by generation, it has properly speaking no degrees.[a] But as the unity which, according to the law, is consequent on marriage, brings the one married partner equally near to the other's kindred, it is customary to designate the nearness of affinity also by degrees;[b] and this according to the rule that, in whatever degree a person is *related* to one of the married pair, he is *affined* in the same degree to the other.[c]

6. With respect to Domicile.

a. Definition.

§ 136. The *domicile* of a person (*domicilium*) is that place in which he has taken up his permanent residence.[d] Such domicile is either *voluntary* (*domicilium voluntarium*) or *compulsory* (*domicilium necessarium*); according as the choice depends upon a man's own will and pleasure, or as he is compelled by legal necessity to remain in a certain place.

1. In order to establish a *voluntary* domicile, two things are requisite: *a.* that a person should actually take up his abode in a place; and, *b.* that he should design to remain there constantly, unless particular reasons determine him to leave it. One of these without the other is not sufficient;[e] and both are also required to effect a *change of domicile*.[f]

2. These have a *compulsory* domicile: viz. *exiles*, at their place of banishment;[g] *soldiers*, at the place where they lie in garrison;[h] *public officers*, at the place where their duties must be performed; *wives*, at the abode of their husbands (*domicilium matrimonii*);[i] and *children*, while under paternal authority, at the abode of their father, unless they have established a domicile of their own with their father's consent.[k]

b. Presence and Absence.

§ 137. 1. With respect to his *own domicile*, a person is either *present* or *absent*. Every one is absent, who is not present at his place of abode;

(*a*) Hence it is said, in fr. 4. § 5. D. 38. 10: "Gradus affinitati nulli sunt."

(*b*) And thus *Paulus* could say, in fr. 10. pr. D. ibid.: "Jurisconsultus cognatorum gradus et affinium nosse debet."

(*c*) can. 3. C. 35. qu. 5.—c. 13. 14. C. 35. qu. 2.

(*d*) Dig. 50. 1.—Cod. 10. 39.—*Glück*, Comm. Vol. 6. § 512–513.—*Linde*, Lehrb. Civ. Proc. § 88.—*Rosshirt*, Z. f. Civ. u. Crim. R. Vol. 2. p. 34. A man who has no settled habitation, is called in legal language, a vagrant (*vagabundus*).

(*e*) fr. 17. § 13. D. 50. 1 "Sola domus possessio, quæ in aliena civitate comparatur, domicilium non facit.—See fr. 27. § 1. D. ibid. —const. 7. C. 10. 39.—*Seuffert*, Erört. I. p. 54.

(*f*) fr. 20. D. ibid. "Domicilium re et facto transfertur, non nuda contestatione."

(*g*) fr. 22. § 3. fr. 27. § 3. D. ibid.

(*h*) fr. 23. § 1. D. ibid.

(*i*) fr. 22. § 1. fr. 38. § 3. D. ibid.—See also fr. 5. D. 23. 2.—fr. 65. D. 5. 1.—const. 9. C. 10. 39.

(*k*) fr. 3. 4. D. 50. 1. This passage is not contradicted by fr. 6. § 1. ibid.; for the latter only speaks of the Roman forum originis.

but a person is often held to be absent in this respect, who, although really present at his place of residence, is *prevented* by some actual hindrance, e. g. by imprisonment or insanity, from the prosecution of his rights.[a] Actual absence from the domicile is either *compulsory* or *voluntary;* and in one as well as in the other case, it is in some respects of importance, whether it is owing to a good, or at least not blameworthy, or bad reason. Absence was accordingly divided by the Romans into *praiseworthy, blameless*, and *dishonourable.*[b] 2. With respect to prescription, the parties were regarded as *present*, when they both resided in the same province; and *absent*, when they lived in different provinces.[c] 3. With respect to legal transactions, a madman or lunatic was also considered as absent; because he is altogether unfit to perform a legal act.[d]

7. With respect to Class and Profession.

§ 138. Many private rights are dependent also on *class* and *profession.* In this respect the military order occupy a very prominent place in the Roman law, on account of the many privileges that were conferred on the *miles.*[e] The sailors attached to the fleet were also regarded as belonging to the military class, and as entitled to the same privileges; but persons discharged from the service, raw recruits, and officers and others connected with the army who were not soldiers, were excluded from them.[f] In contradistinction to the military class, all other persons were called *pagani*, or sometimes *privati.*[g]

8. With respect to Religion.[h]

§ 139. With respect to *religion*, men are either *Christians* (*fideles*) or *non-Christians* (*infideles*). Christians are divided into *orthodox Christians* (*orthodoxi, catholici*) and *heretics* (*hæretici*). The last mentioned term is used to designate those who deny the doctrines of the Œcumenical Councils.[i] Among the non-Christians, the Jews[k] and those who had apostatized from the Christian religion formed the most considerable classes. Against apostates as well as against heretics, the laws of the Roman Christian emperors contain very severe enactments.[l]

(*a*) fr. 1. § 1. fr. 9. 10. 22. § 2. D. 4. 6.
(*b*) See Dig. 4 6.— *Glück*, Comm. Vol. 6. § 467 seqq.
(*c*) const. 12. C. 7. 23.—const. un. C. 7. 31. —Nov. 119. c. 7.
(*d*) fr. 124. § 1. D. 50. 17.—fr. 209. D. 50. 16.—fr. 2. § 3. D. 29. 7.
(*e*) Dig. 29. 1. and 49. 16.—Cod. 12. 36.
(*f*) fr. un. § 1. 2. D. 37. 13.—fr. 4. 42. D. 29. 1.—const. 16. C. 6. 21.
(*g*) For instance const. 19. C. 2. 3.—const. 1. C. 9. 23. comp. also: *Lampridius* in vita Alexandri Severi, c. 58. "nec unquam ad *privatos* pertinerent."
(*h*) *Zimmern*, R. G. Vol. 1. § 130.
(*i*) Nov. 131. c. 1.
(*k*) *Hanbold*, Orat. de statu Judæorum publico sub imperio Romanorum. Leipsic, 1819. and in his Opusc. edited by *Wenck* and *Stieber*. Vol. 2. p. 457.—*Levyssohn*, Diss. de Judæorum sub Cæsaribus conditione et de legibus eos spectantibus. Leyden, 1828.
(*l*) Cod. I. tit. Decret. Gregor. 5. 7. 9. 11. —Cod. Theod. XVI. 5. 7. 8. 10.—Tit. IX. 5. 7.

IV. Death.

§ 140. The existence of a person is terminated by *death*, which is either *physical*[a] or *civil* (§ 121. note *b*). With regard to life and death, the two following rules are to be observed: 1. *Neither the life nor the death of a man is to be presumed.* The fact that a man has lived must therefore be proved; but if this be once established, he is held to be living until evidence of his death is brought forward.[b] However, according to the present common law of Germany, an absent person, who for a long time has not been heard of, may be proclaimed as dead by the judge; if it be proved that, in case he was still alive, he would be seventy years old.[c] 2. Should several persons perish about the same time,[d] so that it cannot be determined with certainty which died first, then: *a.* If it be a case of parents and children, it is presumed, without distinction as to the mode of death, that children below the age of puberty died *before*, and adult children *after* their parents.[e] *b.* If, on the contrary, it be a case of persons who are not parents and children to one another, and if rights of the one are dependent upon the previous death of the other (as e. g. inheritance and legacy), such rights cannot be made available without proof of the previous death of the other party;[f] but if a person receive any thing

(*a*) Often called *natural* death; this term, however, is also frequently used in contradistinction to *violent* death.

(*b*) Respecting the evidence of death, see *Leyser*, Medit. ad Pand. spec. 95. 96.—*Hofacker*, Principia jur. Rom. Germ. § 1681. Comp. also *Hommel*, Rhaps. Obs. 656. § 8. and Obs. 695. § 13.—*Bülow*, Abh. P. 2. No. 26.—Dr. Rosshirt disputes the correctness of the views of Mackeldey given above. Referring to *Heise* and *Cropp*, Jur. Abh. 11. p. 150, he maintains that the *continuance* of life is as little to be presumed as its *commencement* or *termination*. But he is clearly mistaken. The Editor simply refers to Mackeldey's own words used in the text: where he plainly states that neither life nor death was to be presumed; but that in cases where life has been proved to have once existed, its continuance is not to be doubted, until the contrary is shown. Now, we think, it will strike any one who has a correct idea of the proper distribution of the burden of proof, that he who alleges a new fact intended to show the termination of the state of things upon which his adversary relies, should be obliged to prove the same. This principle is so just and natural, that it is highly improbable that any court of justice would depart from it. Mackeldey is therefore perfectly correct, when he states, that if life is once proved to have existed, it is presumed to continue, until evidence of its having ceased is adduced.

(*c*) In the Roman law, it is true, the space of a hundred years is sometimes called the highest age of man: but the passages in which this occurs cannot be used as evidence of the length of human life; for fr. 56. D. 7. 1. merely relates to the duration of a usufruct conceded to a corporation; and const. 23. pr. 1. C. 1. 2. has reference only to prescription against churches and charitable institutions. It is the common practice in Germany, to refer to the expression, "the days of our years are threescore years and ten," used in the 10th verse of the XC Psalm, as evidence of what should be considered as the true period of human life. Comp. *Koch* de succ. ab intest. 8 Edit. Giessen, 1798. p. 223.—*Kind*, Quæst. for. 1st Edit. T. 1. c. 65.—*Glück*, Intestat-Erbfolge. 2d Edit. § 2.—*Gesterding*, Nachforschungen. Vol. 1. p. 388.

(*d*) *Tobias* de rationibus decidendi Ictor. Romanorum in dubiis ex incerto mortis instante commorientium. Utrecht, 1810.—*Glück*, Intestat-Erbfolge. § 4.—*Mühlenbruch* in the Archiv Civ. Pr. Vol. 4. p. 391.—*Gädcke*, de jure commorientium ex disciplina Romanorum. Rostock, 1830.

(*e*) Instances of this presumption will be found in fr. 9. § 1. 2. 4. fr. 16. pr. fr. 22. fr. 23. D. 34. 5.—fr. 26. pr. D. 23. 4. An exception is contained in fr. 17. § 7. D. 36. 1. *Mühlenbruch* (l. c. p. 398) does not confine this presumption to cases where the death has been occasioned by violence, as is done by *Fritz* (zu Wening P. 1. p. 136), nor to descendants and ascendants.

(*f*) Instances may be found in fr. 9. pr. fr. 15. 17. 18. D. 34. 5.

from another, the acquisition of which depends only on the fact that the other did not revoke the grant in his lifetime, then in case of doubt, the giver is regarded as having died first, and the gift cannot be reclaimed, e. g. as in the case of a *donatio inter virum et uxorem*, or a *donatio mortis causa*.[a]

CHAPTER II.

JURIDICAL PERSONS.*

I. General Definition.

§ 141. By the term *juridical* (*moral* or *fictitious*) *persons* is meant every thing, other than a human being, which is regarded by the state as a proper subject of rights.[b] To this class belong, first the *state* itself; then in a monarchy the *ruler*, as holder for the time being of the highest power of the state;[c] the *treasury* or *fiscus* (§ 144); and all *state offices* as regards the rights connected with them. It includes moreover *corporations* of every kind (§ 143), all *pious* and *charitable institutions* (*piæ causæ*) recognised and approved of by the state (§ 145), and lastly the inheritance of a person deceased while it lies unacquired by the heirs (*hereditas jacens*).[d]

II. Corporations.†

§ 142. A *corporation*[e] (*universitas, corpus, collegium*) is a body of persons

(*a*) fr. 8. fr. 9. § 3. D. 34. 5.—fr. 32. § 14. D. 24. 1.—fr. 26. D. 39. 6.

(*b*) See *Heise*, Grundriss, p. 25. note 15.—*Schweppe*, R. Priv. R. Part 1. § 77–83.—*Fritz* zu *Wening*, P. 1. p. 148 seqq.—*Savigny* in the 2d Vol. of his System of the Pandects, p. 235 seqq. The Romans used only the term *personarum universitas* to denote corporation. This applied as well to res publicæ as to incorporated societates; but not to the fiscus or to pias causas, and much less to hereditas, as will be evident when we consider the point of view from which the Pandects regard them as litigating parties. *Rosshirt*, D. Civ. R. § 85. and *Savigny*, l. c.

(*c*) fr. 56. 57. D. 31.—fr. 20. § 1. D. 33. 1.—Nov. 134. c. 6.

(*d*) fr. 34. D. 41. 1.—§ 2. J. 2. 14.—fr. 31. § 1. D. 28. 5.—fr. 22. D. 46. 1.

(*e*) Dig. 3. 4., 47. 22. especially fr. 1. 4. 5.

* The several kinds of juridical persons may be divided into two principal classes, according as they consist of *men* or of *things*.

I. Of Men. 1. Of one man alone, in so far as he fills a certain capacity, as e. g. a chief magistrate or an officer of state. 2. Of a body of men united, as a corporation.

II. Of Things. 1. Of the property of a moral or physical person, the same being viewed as a whole; e. g. the property of the state (*fiscus*), the private property of the prince, the estate left by a person deceased, the separate property assigned to a son (*peculium*). 2. Of a public institution governed by directors, and its property. 3. And finally of lands; inasmuch as these, on account of the rights and duties inseparably attached to them, are regarded as subjects of rights.

In the Roman law, the following kinds of juridical persons especially occur: viz. the *state* (*respublica*), under the name *fiscus*, the term *respublica* itself being often used to denote municipalities; the corporate *communities* of cities and villages; and lastly, *collegia*, i. e. associations of the members of a trade (e. g. *collegium naviculariorum, pistorum*). See Dig. 42. 22. Dig. 3. 4. *Sintenis* de societate quæstuaria, &c. p. 14 seq.

† Moral persons are created either by the state itself, as e. g. by establishing public

united for some permanent object, invested with the capacity of acting as a single person, and recognised as a moral juridical person by the state. The corporation as a *whole* is therefore considered as a person; and accordingly it appears as an individual subject of rights in itself and entirely apart from the physical persons who form its constituent members. Such a corporation can arise only under permission and by authority of the state; and for its establishment, though not for its continuance, at least three members are requisite according to the Roman law.[a] A corporation constituted in the proper manner remains al-

6. 8. 9.—Cod. 10. 40–68., 11. 29–39. *Fellenberg*, Jurispr. antiq. Vol. 1. p. 397.—*Heinecius*, Diss. de colleg. et corpor. opificum.—*C. S. Zachariä*, Lib. quæst. Wittenberg, 1805. qu. 10.—*Dirksen*, Civ. Abh. Vol. 2. No. 1.—*Rosshirt* in the Archiv. Civ. Prax. Vol. 10. p. 331.—*Zimmern*, R. G. Vol. 1. § 131.—*Linde* in the Arch. Civ. Prax. Vol. 10. p. 18; and in his Z. f. Civ. R. Vol. 15. Nos. 7. 8.

(*a*) fr. 1. pr. § 1. fr. 3. § 1. D. 47. 22.—fr. 1. pr. D. 3. 4.—fr. 85. D. 50. 16. "Neratius Priscus tres facere existimat collegium."—fr. 7. § 2. D. 3. 4.—*Stryk*, Usus mod. Lib. 47. tit. 22.

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offices, or institutions for public instruction (such as the universities in Germany), &c.; or else by private individuals, in which case, whether the object be a public or private one, it is necessary to obtain the consent of the government. A corporation is essentially different from a *societas* (partnership); for, 1. The rights and duties of corporate bodies do not apply *pro rata* to the individual members. Hence Ulpian says, in fr. 7. § 1. D. 3. 4: "Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent." The creditors, therefore, can look only to the property of the corporation, unless the members have also bound themselves individually. Partners, on the contrary, as physical persons, have pro rata shares in the rights and duties of the societas to which they belong; and the reason why this is not the case with a corporation is, because it is regarded as a permanent unity. 2. Of corporations it is said, *universitas non moritur*, i. e. a corporation is not affected by the accession of new and the departure of old members, but continues the same. A societas, on the contrary, ceases as soon as one of the partners dies or withdraws from it. 3. The will of individual members of a corporation cannot dispose of its property or effect its dissolution; but in a societas, a single partner, because he is proprietor of his share (*pro rata dominus*), may effect the termination of the partnership and a division of its property. This distinction between a societas and a corporation holds good even with respect to a mercantile partnership; although the latter, under the firm it has chosen, likewise seems to form a whole. (*Schweitzer* de Firma Mercatorum, p. 45 seqq.) For such a firm is nothing but a name for the business connexion of the partners, in order to distinguish their joint acts and transactions from all others that may be undertaken privately by a single partner; and it does not change their societas into a moral person. A mercantile association may however acquire the quality of a moral person when it has been chartered by the state, as is very commonly the case at the present day with joint-stock companies, insurance companies, and banks. (Code de Comm. Art. 37. *Martens*, Handelsrecht. § 24. *Pöhl's* Recht der Actien-Gesellschaften. Hamburg, 1842. p. 12 seqq. Wetboek van Koophandel voor het Koningrik der Nederlanden. Book I. tit. 3. § 9.) The editor reserves his more extended observations on this subject for that part of the present work which treats of partnership, where will be found a discussion of the principles applicable to those commercial associations which at present occupy so prominent a place throughout the different countries of Europe, as well as in the United States. Here however it may be remarked, that in cases where it is *doubtful* whether a union of several persons be recognised as a corporation by the state, the question must be decided in the negative, according to the rule, *in dubio res redigenda est ad minimum*; since to presume it to be a corporation, would imply the loss of the pro rata rights of the single members in the estate belonging to the association. (See *Braun*, Erörterungen. p. 227 seqq.)

The legal relations of a corporation are defined in part by positive precepts respecting its constitution and organization, or the rights and duties of its individual members (*charter* and *by-laws*); and in part by tacit observances. Regulations established [illegible]

ways the same juridical person, even though, in the course of time, its members should all be changed.[a] The affairs of a corporation, which include only such as relate to its common object and to its property,[b] are conducted by the will of the corporation itself regarded as a

(*a*) fr. 7. § 2. D. 3. 4. "In universitatibus nihil refert, utrum omnes iidem maneant, an pars maneat, vel omnes immutati sint. Sed si universitas ad unum redit, magis admittitur posse eum convenire et conveniri, quum jus omnium in unum recideret et stet nomen universitatis."

(*b*) See *Langenn* and *Kori*, Erört. Vol. 2. Nos. 1. 2. 4.—*Savigny*, System. Vol. 2d. p. 246 seqq.

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by the legislature, but by the corporation itself (by-laws), are obligatory on its members only.

Every corporation is entitled to appoint directors to represent it and to manage its affairs, who may be charged with all or only certain kinds of business, e. g. the management of its property and the keeping of its accounts. If a corporation have no officers, it must appoint representatives for special occasions; as is requisite, for instance, in suits at law brought by or against the corporation: Such a representative before a court bears in the Roman law the title of *syndicus*. From the acts of its officers proceed rights as well as duties for the corporation, provided they have acted according to and within the bounds of their instructions, or at least have employed what was acquired by the transaction, for the benefit of the corporation. Corporations, however, as they act not by themselves but by representatives, are entitled, like minors, to the *beneficium restitutionis in integrum*, against the injurious acts of their representatives. The Prussian law does not extend this privilege to contracts and similar legal transactions, but restricts it (as seems more just) to neglects, oversights, and errors, which are committed in the legal proceedings of corporations by their representatives.

Among the rights of the members of corporations is that of voting (*jus voti*), by virtue of which every member is entitled to participate in the deliberations and resolutions of the body respecting its affairs, and consequently to be previously notified of its meetings and of the subjects to be discussed. Of course there is no necessity for the concurrence of the corporation itself in matters whose management is intrusted to its officers or to certain of its members.

The division of the property of corporations has been a frequent subject of controversy, and the opinions of civilians still remain at variance respecting it. The dispute relates chiefly to the number of votes required to give validity to a resolution for making such division; and to the principle to be applied in carrying it out. The views entertained respecting the right to make a division are of such opposite natures, that while some jurists have maintained that a single member is entitled to enforce a division, others will not allow even to a majority of the members assembled for the purpose of making a division, the right to pass a resolution to that effect. Civilians of note have shown with sufficient clearness, that the notion that single members have a right to require a division (in support of which, fr. 8. D. 10. 3. is commonly referred to) has arisen from confounding the relations of a *communio* with those of a corporation; they have shown too that no law can be adduced to justify it. Moreover, the distinction pointed out above between a *res communis* and the property of corporations, fully explains that where no pro rata right exists, no action can be brought for a division. Non-attendance on the part of members properly notified implies a renunciation of their right to vote, and leaves the decision to the majority, which is formed by two thirds of the members present, not by two thirds of all the members capable of voting. Two thirds of the members present can alone pass a valid resolution, says const. 46. C. 10. 31. Although this has special reference to the *ordo decurionum*, there is not the slightest reason for regarding it as a mere exception with respect to municipal authorities, as many jurists have attempted to maintain—and this too contrary to the practice, to which Thibaut (System. § 220.) among others has rightly given his support. The opposite party again refer erroneously to fr. 28. D. 10. 3., where Papinian says: "In re communi nemo dominorum jure quidquam facere potest invito altero; unde manifestum est, prohibendi jus esse. In re enim pari potiorem causam prohibentis esse constat." (*Hellfeld*, Jurispr. forensis. lib. 10. tit. 3. § 739. *Leyser*, Med. ad Pand. T. II. 11. Sp. 118. Med. 3. cap. 29. de reg. in 6to.) For this plainly refers to a *res singulorum*, and not to a *res*

juridical person. This will is expressed by a joint resolution (*conclusum universitatis*). The manner in which this is to be effected may be defined by the constitution of the corporation. But if the constitution has no provisions on the subject, the rule is, that all members who have a vote must be convened; and that whatever is then determined on by a majority of the voters actually present, is to be regarded as the actual will of the corporation, to which dissenters and absentees, if any there be, must submit.[a] In this manner, also, resolutions may be adopted respecting the disposition or alienation of the property of the corporation, and its distribution among the individual members; but such alienation is subjected to the same legal rules as that of the property of minors.[b]

(*a*) fr. 160. § 1. D. 50. 17.—const. 5. C. 10. 63.—const. 3. C. 11. 31.—Nov. 120. c. 6. § 1. 2.—cap. 1. 3. 4. X. 3. 11.—cap. 42. X. 1. 6. It is generally considered that wherever its constitution has no special provisions on the subject, a majority of two thirds of all the voting members of a corporation should be present, and that a majority of those thus present should agree, in order to render a resolution obligatory upon all. *Glück*, Comm. Vol. 1. § 91.—*Kind*, Quæst. Vol. 3. c. 96.—*Runde*, Beiträge. Vol. 1. No. 1. § 16 seqq.

(*b*) Opinions differ in regard to the question, in what manner the property of municipal corporations should be distributed among its members or a change of its use effected. Some jurists consider that the unanimous consent of all is requisite. *Runde*, Deutsch. Priv. R. § 181.—*Bülow* and *Hagemann*, Pract. Erört. Vol. 3. No. 25. Vol. 6. Nos. 1 and 6.—*Ende*, Jurist. Abh. Vol. 1. No. 20. Others think that the consent of a majority is sufficient. See *Gönner*, Ueber Cultur und Vertheilung der Gemeindeweiden. Landshut, 1803. *Danz*, Handb. d. Deutsch. Priv. R. Vol. 2. p. 547. And a third party allows to every single member, the right to compel a distribution. See *Krüll*, Prüfung einzelner Theile des bürgerlichen Rechts. Vol. 2. N. 1. According to Mackeldey's opinion, a formal resolution of the corporation confirmed by the government of the state would be required. The following are also of the same opinion: *J. G. Gaudlitz*, Diss. de finibus inter jus singulorum et universitatis regundis. Leipsic, 1824. (In Haubold's Opusc. Vol. 2. p. 547.) —*C. S. Zachariä*, Lib. Quæst. qu. 10.—*Thibaut*, Civ. Abh. No. 18. In addition to the writings already mentioned, the following deserve to be noticed here. *Meyer*, Ueber Gemeinheitstheilungen. 3 Vols. Celle, 1801–5. (Only the 3d Vol. belongs here.)—*Niemeyer*, Anleitung zum Verfahren in Gemeinheits-Theilungssachen. Hanover, 1806.—*Klebe*, Grundsätze der Gemeinheits-Theilung. 2 Parts. Berlin, 1822.—*Lotz*, Civ. Abh. Co-

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universitatis. (*Struben*, Rechtl. Bedenken. Vol. 3. Bed. 3. Vol. 5. Bed. 128.) The assent of the government to the resolution is universally regarded as requisite, in order to protect as well the general interests of the state as those of future generations of members. (*Mittermaier*, Deutsch. Priv. R. § 117 seqq.)

As regards the *principle* of division, the majority of course have the right to determine on that also. But if this be not done, it is usually made *per capita*. This is the only correct mode; since every member as such has an equal right. The proportion in which the members have formerly used and enjoyed the property of the corporation, is a mere condition *de facto* and not *de jure*, and consequently cannot lead to any decision; neither can the proportion in which they have borne the corporation taxes and burdens. In one case, however, the division may be made in the proportion in which the property was formerly used; and that is, where individual members, by virtue of an *actual legal title*, have a more extensive right of use than others. (*Mittermaier*, l. c. *Thibaut*, System. § 221.)

As regards the descent of the property on the dissolution of a corporation, in the case of public institutions endowed either directly or indirectly by the state, it reverts to the same. But in the case of other corporations, their property falls to the state only when there are no heirs to which it can be left; that is to say, when at its dissolution there are no members of the corporation surviving, and no provision has been made by it respecting the inheritance of its property: for the property is then considered as *bona vacantia*, like the estate of a physical person who dies without heirs.

§ 143. A corporation, as a juridical person, is capable of holding and acquiring rights; and if once legally constituted, it enjoys *ipso jure* all those rights without which it could not continue to exist. Among these are comprised the right of admitting new members, of appointing presiding and other officers, of having a common treasury, and of making by-laws.[a] The *jura minorum* are also now conceded to corporations whose affairs are managed by a board of directors.[b] The government may also grant to corporations other special privileges, e. g. a jurisdiction of its own, a right of succession to uninherited property left by its members, and other immunities.[c] As a corporation may possess property, real rights, and personal claims, so also it may be under liabilities to other persons. Those rights and liabilities do not belong to the individuals who are its members, but to the corporation itself regarded as a juridical person;[d] although a right of use may be vested in the individual members with regard to certain property of the corporation, such right being limited to the peculiar use to which the property is devoted.[e] A corporation ceases to exist when the last member drops off, or when it is dissolved by the state. In such case, whatever property there may be belonging to the corporation, if it was one designed for public purposes, becomes the property of the state; but if the corporation was designed for private purposes, when it is dissolved by the state, its property is divided among the last remaining members.[f]

III. Fiscus.

§ 144. By the term *fiscus* (treasury) is now especially understood the property of the state, in contradistinction to the private property of the ruler for the time being.[g] With relation to rights and duties, the fiscus is always regarded as a moral person. It has not only a right to all the ordinary and extraordinary state revenues, to the latter of which also belong the *bona vacantia*; but there also pertain to it many prerogatives and privileges,[h] which we shall notice under the

burg and Leipsic, 1820. p. 245. 262.—*Weichsel*, Ueber gemeinschaftliches Eigenthum, Gemeinheiten, &c., Magdeburg, 1824. *Maurenbrecher*, Deutsch. R. § 160.

(*a*) fr. 1. § 1. D. 3. 4.—fr. 1. § 2. fr. 18. D. 50. 4.

(*b*) Arg. const. 3. C. 11. 29.—const. 4. C. 2. 54.—const. 3. C. 11. 31.

(*c*) const. 8. C. 6. 24.

(*d*) fr. 7. § 1. D. 3. 4. "Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent." § 2. J. 2. 1.—fr. 6. § 1. D. 1. 8.—

(*e*) These are called *res universitatis* in a strict sense, in distinction from *patrimonium universitatis*, which is not subject to the use of the single members, but the profits of which are preserved for the purposes of the corporation.

(*f*) fr. 7. § 2. D. 3. 4.—fr. 21. D. 7. 4. See *Marezoll* in Löhr's Mag. Vol. 4. p. 207.—*Fritz* zu *Wening*, Part 1. p. 159.

(*g*) *Pauli* Sent. rec. Lib. 5. tit. 12.—Dig. 49. 14.—Ced. Theod. 10. 1.—Cod. Just. 10. 1.—Fragmenta vet. Icti de jure fisci; appended to Gaius's Inst.—*Peregrini* de jur. et privil. fisci. Cologne, 1663. — *Hörlin*, Von dem Rechte des Fiscus. Ulm, 1810.

(*h*) According to the Roman law and to judicial usage in Germany, the prince and princess enjoy the same privileges in regard to their patrimonial estates. fr. 6. § 1. D. 49. 14.—const. 3. C. 7. 37.—*Brissonius* de verb. signif. sub. voce *ratio*.

heads to which they belong. We have here only to state the general rule, that in case of doubt, sentence must be given *against the fiscus.*[a]

IV. Piæ Causæ.

§ 145. The term *pia causa* denotes an institution for pious and charitable purposes or for the public benefit, and is the general name given to every establishment which has for its object the promotion of piety, the relief of necessitous persons, the spread of education and knowledge, or the advancement of science and the arts.[b] Institutions of this kind are to be regarded as moral persons, only in case they have been recognised as such by the state, by way of approval and confirmation.[c] Otherwise they lack the capacity for rights, and cannot acquire any thing. Still the confirmation of them on the part of the state may be subsequent to their foundation; and then it has a retrospective effect back to the time of such foundation.[d] If such *pia causa* be confirmed by the state and therewith recognised as a moral person, it can not only have rights of all kinds, and make acquisitions *inter vivos* as well as *mortis causa*, but it also enjoys the privileges of minors, as well with respect to *restitutio in integrum* as concerning the alienation of property.[e]

(*a*) fr. 10. D. 49. 14. But comp. also Nov. 161. c. 2. and Edict. Justin. 4. c. 2. § 1.—*Savigny*, System. 2d Vol. p. 360 seqq.

(*b*) Cod. 1. 3.—Nov. 120.—*J. H. Böhmer*, Jus ecclesiasticum Protestantium Lib. 3. tit. 5. § 21–28.

(*c*) Elvers is of a different opinion. See his Theoret. Prakt. Erört. aus der Lehre von der testamentarischen Erbfähigkeit insbesondere juristicher Personen. Gottingen, 1827. p. 157 seqq. Some later jurists have asserted, that according to the explicit words of const. 46. pr. C. 1. 3. all kinds of pise causæ might be founded by mere private will, through testamentary appointment as heir or legatee; but that constitution is unglossed and moreover a *lex restituta* (§ 70). *Mühlenbruch*, l. c. p. 58–182.

(*d*) A pia causa therefore, if founded by a last will, and appointed heir, is to be regarded as capable of inheriting, though its confirmation by the state should not take place until after the death of the testator. Arg. fr. 62. pr. D. 28. 5. A different opinion is held by *Mühlenbruch*, l. c. p. 264 seq.

(*e*) const. 35. in fin. C. ibid.—const. 23. pr. C. 1. 2.—Nov. 120. cap. 1. § 2. cap. 6. § 2.—cap. 1. 3. X. 1. 41.

THIRD DIVISION.

OF THINGS.

1. Corporeal and Incorporeal.

§ 146. By "*res*" is meant every thing that may form an *object* of rights; in opposition to *persona*, which is regarded as a *subject* of rights. *Res*, therefore, in its general meaning, comprises *actions* of all kinds; while in its restricted sense, it comprehends every object of right, except actions. Certain things, however, do not admit of being owned by individual citizens (*res extra commercium*); consequently they are not subject to private transactions, nor can their value be defined.[a] Things which are *in commercio*, are either *corporeal*, that is, such as are perceptible to the senses (*res quæ tangi possunt*);[b] or *incorporeal*, that is, such as the mind alone can perceive (*res quæ intelliguntur*). Only rights and claims* were considered by the Romans as things of the latter description.[c]

(*a*) fr. 6. § 2. fr. 9. § 5. D. 1. 8.—fr. 83. § 5. D. 45. 1. Res extra commercium are: 1. the *res divini juris*, with respect to which, however, the Roman views are no longer applicable. 2. Of the *res humani juris* the *res communes omnium*, as the sea, the sea-shore, the banks of rivers, &c., the theatra and stadia, &c.

(*b*) *Gaius*, II. 1-17.—Inst. 2. tit. 1. Dig. 1. 8. *Westphal*, Ueber die Arten der Sachen. Leipsic, 1788.—*Hofmann*, Versuche. No. 2. Darmstadt, 1831.—§ 1. J. 2. 2. "Corporales hæ sunt quæ tangi possunt, veluti fundus, homo, vestis, aurum, argentum, et denique aliæ res innumerabiles." — fr. 1. § 1. D. 1. 8.

(*c*) § 2. J. 2. 2. "Incorporales autem sunt quæ tangi non possunt, qualia sunt ea quæ in jure consistunt, sicut hereditas, ususfructus, usus, obligationes quoquo modo contractæ.—§ 3. Eodem numero sunt jura prædiorum, urbanorum, et rusticorum, quæ etiam servitutes vocantur." *Theophilus* ad § 2. 3. cit.—

* Thus says Mackeldey in the older editions; to which Rosshirt adds, that it is uncertain what rights the Roman jurists meant to include under the head of incorporeal things, and that the Institutes enumerate only *servitutes*, *hereditas*, and *obligationes*. But an examination of the passages cited in note *c* will leave no doubt as to what the Romans understood by *incorporeal things*. For these passages clearly mean to say, as will be seen from the examples given by way of illustration, that *rights of whatever description*, and (as the Editor thinks) even *duties of every kind*, are incorporeal things. This opinion will be found supported not only by common sense, but also by the logical interpretation of the passages themselves; for they declare that *omnia quæ in jure consistunt* (i. e. rights and duties) are *incorporalia*, and the instances given are explicitly designated as mere illustrations of this definition. Even Buchholtz's idea (Versuche. Berlin, 1831. No. 1.), that the Romans did not reckon the right of property among the *res incorporales*, appears purely arbitrary. The passages in the Corpus Juris to which he refers do not by any means warrant this supposition; for fr. 13. § 1. D. 39. 2. speaks not of the *right* of ownership, but of the *object* of the right; and const. 10. C. 7. 32. speaks, not of the corporeality of the right of ownership, but of the well known distinction between *detention* and *juridical possession*. Now it is evident that both these kinds of possession in themselves considered are of an incorporeal nature, while the object of possession may be corporeal, or, in case of *quasi-possessio*, incorporeal.

II. Moveable and Immoveable Things.

§ 147. Corporeal things are either *moveable* (*res mobiles*) or *immoveable* (*res immobiles*). *Moveable things* are those which may be transported from one place to another, without injury to their substance and form.[a] *Immoveable things* are: 1. Such as *by their nature* are physically incapable of a change of place, e. g. lands (*prædia rustica, fundi*); or which cannot be removed to another place without injury to their substance, e. g. buildings (*prædia urbana, ædificia*).[b] 2. In a *legal respect*, however, those things in themselves moveable are regarded as immoveable, which, either by the *operation of nature* or by *human art*, are connected with an immoveable thing in such manner as to constitute a part of it,[c] or which are procured in order to be used constantly in the service of an immoveable thing.[d] But in the latter case, it is requisite that they be actually employed for the purpose designed, and not separated from the thing with an opposite intention; for else they will not be considered as immoveable.[e] Moveable things of this description are termed, with respect to the immoveable things to which they belong, *appurtenances* and *fixtures* (§ 153).

III. Things to be furnished in Genere and in Specie.[*]

§ 148. By *genus* is understood in legal language not simply a whole class of things, but rather a single thing which is designated only by the

fr. 1. § 1. D. 1. 8.—fr. 1. § 7. D. 35. 2.—*Hugo*, Civ. Mag. Vol. 4. No. 1. Idem. Heutiges R. R. 7th Edition. p. 37.—Other jurists reckon among incorporeal things those also which, although corporeal when taken *specifically*, yet form *generically* the objects of rights. *Thibaut*, Syst. § 258.—*Wening*, Lehrb. Civ. R. § 114.—*Seuffert*, P. R. § 58. *Mühlenbruch*, Doctr. Pand. § 91. — *Buchholtz*, l. c. p. 12. —*Höpfner*, Commentar. 8th Edit. by A. D. Weber. § 339 seq.—*Heineccii* Elem. sec. ord. Institt. § 340.

(*a*) When moving by their own power, they are sometimes called, *res se moventes*, as e. g. slaves and animals. Comp. fr. 93. D. 50. 16.

(*b*) Comp. fr. 115. 211. D. ibid. fr. 60. D. 41. 1.—*Buchholtz*, Vera. No. 2.

(*c*) E. g. a tree which takes root in the ground, and all fixtures (*vincta, fixa*) fr. 44. D. 6. 1. "Fructus pendentes pars fundi videntur." Comp. fr. 13. § 31. fr. 15. fr. 38. § 2. D. 19. 1.

(*d*) fr. 17. § 7. D. ibid. Comp. fr. 17. pr. D. ibid.—fr. 242. § 2. D. 50. 16.

(*e*) fr. 17. § 10. 11. fr. 18. § 1. D. 19. 1.—fr. 66. § 2. D. 18. 1.—fr. 41. § 12. D. 30.—fr. 242. § 4. D. 50. 16.

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* Whether a thing is due *in genere* or *in specie*, depends in each case on the will of the transacting parties; so that things of the same description must in one case be furnished *in genere*, and in another *in specie*. If a thing be designated only by its *kind*, as e. g. any house whatever or any of my houses, any cask of wine or any cask of the vintage of 1834 in my cellar, it may be furnished *in genere*. But if the thing be designated *individually*, as e. g. my house No. 200 Waverley Place, or my five year old bay saddle-horse, it is not then generic, that is, it must be furnished or returned *in individuo*. The practical distinction between the two is, that he who has a right or an obligation with respect to a thing *specifically* designated, cannot require or furnish any other than the very thing itself; whereas in the case of a thing which is designated *generically*, the party obliged has the choice of giving which of the species he will, as the other party has no right to any one in particular. It is, moreover, sufficiently evident of itself, that where a performance is due in a certain genus, it cannot be effected in any

class to which it belongs, and which forms as such the object of a right; *species*, on the contrary, is the term applied to a thing which is designated by its individuality.[a] On this distinction is founded the division of things into those which may be furnished *in genere* and those which must be furnished *in specie*. As these ideas are altogether relative, a thing may in one case be capable of being furnished or restored in kind, and in another it may not. For *every* thing may be furnished *in genere*, if, as regards the transaction of which it is the object, respect is had not to it specifically, but rather to its kind or quantity.[b] A thing is to be furnished *in specie*, if, as regards the transaction of which it is the object, respect is had to its species.[c] Hence, 1. it is wrong to understand the whole division as applying to moveable things only, since immoveable things may also be regarded as liable to be furnished in kind, e. g. I devise to a person a piece of land of a certain size, or one of my houses;[d] again, 2. it is wrong to say that all those things which in daily traffic are wont to be measured, counted, or weighed (*quæ pondere, numero, vel mensura constant*) are always things that may be furnished or restored in kind; for although they usually are so, yet they may be such as are incapable of being furnished or restored in kind;[e] and lastly, 3. it is wrong to regard things consumable by use (*quæ usu consumuntur*) as identical with specific things; for although things that are consumed by use commonly "*in genere suo functionem recipiunt*," still they admit of being replaced by others of the same kind. So too, things not consumable by use may sometimes be such as are required to be furnished or restored in kind.[f]

(*a*) fr. 54. pr. D. 45. 1.—fr. 30. § 6. D. 30.—Comp. *Hofmann*, Ueber den Einfluss allgemeiner Pfandrechte auf die einzelnen Sachen des Schuldners. (On the Influence which General Mortgages have on the single things of the Debtor.) Darmstadt, 1830. contra: *Buchholtz*, Vers. p. 13.

(*b*) Hence it is said of things which come into consideration in this manner, in fr. 2. § 1. D. 12. 1. "In genere suo magis recipiunt functionem per solutionem quam specie." From this has arisen the use of the barbarous term, "res fungibiles." See also pr. J. 3 14. (15.)—The expression, "res usu consumptibiles," occurs in a Latin translation of a Greek codicil, in fr. 101. pr. D. 32.

(*c*) *Schott*, Pr. de rebus quæ functionem recipiunt. Leipsic, 1767.; and in his Opusc. p. 212.—*Pfizer*, Von der Collation. § 211–220.—*Löhr's* Mag. Vol. 4. p. 138.—*Thibaut*, System. § 261.

(*d*) Another opinion is entertained by *Pfizer*, l. c. (§ 211), who urges that the term 'fungible things' should be confined to such as are moveable.

(*e*) For instance, fr. 30. § 6. D. 30. "Si legetur pecunia quæ in arca est, vel vinum quod in apothecis est." The idea of fungible things is most distinctly perceived in its application to money. Comp. fr. 24. D. 16. 3.—fr. 34. § 4. D. 30.—fr. 4. D. 13. 6.—fr. 37. D. 45. 1. and *Seuffert*, Erört. I. No. 10.

(*f*) E. g. where a horse has been bequeathed *in genere*.

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other genus, as e. g. where a picture of Raphael is to be delivered, the plaintiff cannot require, neither can the defendant discharge himself by furnishing a picture by another master. From what has been said, these two rules naturally follow: 1. *Debitor speciei liberatur interitu rei*. He who is bound to furnish a thing in specie, is relieved when it ceases to exist (e. g. when Dick, the horse which he was to deliver, dies). 2. *Debitor generis non liberatur rei interitu*. He who is obliged to furnish a thing of a certain kind, is not relieved unless the kind is exhausted (e. g. one who undertakes to furnish state stock is not discharged unless all the stocks of the state are out of existence. The

IV. Single things and Universitas rerum.[a]

§ 149. One or more single things considered by and in themselves are called in legal language *res singulæ* or *singulares*; and these are either *simple*, when consisting of naturally coherent, homogeneous parts (*corpus quod uno spiritu continetur, s. unitum*), e. g. an animal, a stone; or *compound*, when they consist of different parts mechanically connected (*corpus quod ex contingentibus constat, s. connexum*), e. g. a house, a ship. Several single things, which, though not mechanically connected with one another, are, when taken together, regarded as a whole in any legal respect (*corpus quod ex distantibus constat*), are called *universitas rerum*.[b] With respect to the latter, it is customary to make a further distinction between a *universitas facti* and *juris*. By *universitas facti* is meant a plurality of corporeal things of the same kind, which are regarded as a whole, e. g. a herd of cattle, a stock of goods;[c] by *universitas juris* is meant, on the contrary, a quantity of things of all sorts, corporeal as well as incorporeal, which taken together are regarded as a whole, e. g. an inheritance, an estate.[d] This distinction is unobjectionable considered in itself; but it is erroneous to maintain that the *universitas juris*, but not the *universitas facti*, was subject to the rule, "*res succedit in locum pretii, et pretium in locum rei*" (i. e. all that is acquired by means of and instead of the single things pertaining to the *universitas*, belongs to the latter, and may be claimed by him who has a right to the *universitas*). For that rule obtains, even with respect to a *universitas juris*, only when it is the object of a universal succession,[e] and not when it occurs as the object of a singular succession.[f]

V. Things Divisible and Indivisible.

§ 150. Things are either *divisible* or *indivisible*.[g] 1. A corporeal thing is *physically divisible*, when, without destroying it, it can be divided into

(*a*) *Mühlenbruch*, Obs. cap. 1.—*Hasse* in the Arch. Civ. Prax. Vol. 5. No. 1.—*Warnkönig*, ibid. Vol. 11. p. 169.—*Spangenberg* in Elvers's Themis. Vol. 2. p. 334.—*Welcker*, Juris. Encycl. p. 661. 662.—*Elvers*, Jur. Zeit. 1830. p. 39.—*Buchholtz*, Vers. No. 3.—*Rosshirt* in his Z. f. Civ. u. Crim. R. Part 1. p. 114. —*Mühlenbruch* in the 18th Vol. of the Civilist. Archiv. No. 12.—*Rosshirt*, Ueber Vermächtnisse. (On Legacies.) Vol. 2. p. 29.

(*b*) fr. 30. pr. D. 41. 3.—fr. 23. § 5. D. 6. 1.

(*c*) § 18. J. 2. 20.—fr. 13. pr. fr. 34. D. 20. 1. —fr. 1. § 3. D. 6. 1.—fr. 70. § 3. D. 7. 1.

(*d*) § 6. J. 2. 9.—fr. 1. § 1. D. 43. 2.—fr. 13. § 8. D. 5. 3.

(*e*) Therefore especially in the case of an inheritance. fr. 20. pr. § 1. 2. 10. 12. fr. 22. D. 5. 3. But in the case of a peculium, only in regard to its transmission by inheritance and the actio de peculio. fr. 5. § 5. 11. 14. D. 14. 4. —const. 1. C. 12. 37.—*Thibaut*, System. § 262. —*Höpfner*, Comm. § 278.

(*f*) fr. 56. D. 6. 1.—fr. 32. § 2. D. 15. 1.—const. 6. C. 3. 32.—*Glück's* Comm. Vol. 6. § 538.

(*g*) *Buchholtz*, Vers. No. 4.

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essence of a transaction usually indicates whether its object be generic or specific; but besides this, it may be ascertained from a special agreement of the parties or an explicit declaration on the part of the testator. The view of Thibaut and some other jurists, that things which are to be furnished *in genere* should be reckoned among *incorporeal* things, may appear to be rather subtle: still it is correct; for, before the time of performance or delivery, the thing to be furnished in genere has no individuality, and consequently is not a *corpus certum*.

real parts, each one of which after the division forms a separate and independent whole. If a thing be actually divided in this manner, its single parts are called in Roman legal language, *partes certæ;* and the individual shareholders possess the thing *pro diviso*. 2. A thing is *juridically divisible*, without distinction as to whether it be physically divisible or not, if it be possessed by several persons in *common*, that is to say, in *imaginary portions* (*partes incertæ*). When such is the case, it is said, they possess the thing *pro indiviso*, or *rem habent communem*.[a] A thing is *juridically indivisible*, where a part of it cannot even be imagined, in a legal point of view.[b]

VI. Res Existentes et Futuræ.

§ 151. With respect to their existence, things which form the object of a legal transaction are either *res jam existentes*, or they are *res futuræ*, when their existence is only in anticipation, whether they depend upon the ordinary course of nature, as the fruits of the earth, or upon chance, as a draught of fishes.[c]

VII. Things Principal and Accessory.

§ 152. A *principal* thing (*res principalis*) is a thing which can subsist by itself, and does not exist for the sake of any other thing. All that belongs to a principal thing or is in connexion with it, is called an *accessory* thing (*res accessoria*); to this class belong the things which the Roman law embraced under the term *causa rei*, and also the *impensæ in rem collatæ*.

A. Causa rei.

1. *Accessions.*

§ 153. Under the term *causa rei* the Roman law comprehends all that the claimant of the principal thing can demand from the defendant in addition thereto, and especially what he would have had, if the thing had not been withheld from him. These are chiefly the *accessions* and *fruits* of the thing.[d] *Accessio* is the general name given to every accessory thing, whether corporeal or incorporeal,[e] that has been added to a principal thing from without,[f] and has been connected with it, whether by the powers of nature or by the will of man, so that in virtue of this connexion it is regarded as part and parcel of the

(*a*) Instances are contained in fr. 8. D. 6. 1.—fr. 6. § 1. D. 8. 4.—fr. 25. § 1. D. 50. 16.

(*b*) E. g. servitudes. fr. 17. D. 8. 1.

(*c*) fr. 15. pr. D. 20. 1.—fr. 11. § 3. D. 20. 4. —fr. 8. pr. § 1. fr. 34. § 2. D. 18. 1.—fr. 11. § 18. D. 19. 1.—fr. 73. D. 45. 1.—fr. 17. pr. D. 32.—§ 7. J. 2. 20.—*Buckholtz*, Vers. No. 5.

(*d*) fr. 20. D. 6. 1.—fr. 35. 75. 246. § 1. D. 50. 16.—fr. 31. pr. D. 12. 1.

(*e*) Incorporeal accessions are, for instance, such rights as are considered to belong to a thing. fr. 47–49. fr. 78 pr. D. 18. 1.; or rights which only serve to secure other rights, e. g. those which a creditor has against the surety for his debtor. fr. 91. § 4. D. 45. 1.—fr. 43. D. 46. 3.—fr. 71. pr. D. 46. 1.—§ 5. J. 3. 20. (21.) —*Buckholtz*, Vers. No. 6.

(*f*) But see § 154. note *g*.

thing. The *appurtenances* to a thing are to be noticed as a peculiar kind of accession;[a] they are things connected with another thing with the view of serving for its perpetual use (§ 147). The accessory quality of a thing is founded either on legal decision[b] or on private will; and it is extinguished by a total and permanent separation from it, but not by a mere temporary separation.[c] Appurtenances may belong to moveable[d] as well as to immoveable things; and those of the latter may themselves be either moveable, or immoveable, or incorporeal things.[e] As respects the appurtenances to a thing, we have here to notice the general principle, that every disposition made to a principal thing includes also the appurtenances thereto, unless they are expressly excepted.[f]

2. *Fruits.**

§ 154. 1. *Fructus*, in the proper sense of the term, are the organic productions of a thing.[g] As long as they remain united with the thing which produces them, they are called *fructus pendentes* or *stantes*,[h] but

(*a*) See in general: *Hommel*, Pertinenz- und Erbsonderungs-Register. Latest edition, Leipsic, 1794.—*Beselin*, Theoria generalis de pertinentiis. Gottingen, 1782.—*Gesterding*, Irrthümer. No. 10.—*De Reden*, Diss. de accessionibus fundi Romani ductu L. 5. D. de instructo vel instrumento legato. Gottingen, 1823. *Funcke*, Lehre von den Pertinentien aus der Natur der Sache und dem Röm. Rechte, mit Rücksicht auf das heutige Maschinenwesen. Chemnitz, 1827.

(*b*) fr. 13. § 31. fr. 14–18. D. 19. 1.

(*c*) fr. 17. § 11. D. 19. 1.—fr. 242. § 4. D. 50. 16.

(*d*) fr. 66. D. 32.—fr. 15. D. 33. 6.

(*e*) fr. 20. § 7. D. 33. 7.—fr. 31. D. 32.—fr. 47–49. fr. 78. pr. D. 18. 1.

(*f*) fr. 13. § 31. fr. 14, 18. D. 19. 1.—fr. 19. § 20. fr. 20. D. 34. 2.

(*g*) fr. 77. D. 50. 16. The *partus ancillæ* however is not reckoned by the Roman law, among the fruits, but among the accessions fr. 28. § 1. D. 22. 1.—§ 37. J. 2. 1. *Thibaut*, Civ. Abh. p. 35.—The word *fructus*, it may be observed, signifies sometimes also the right to the fruits of a thing belonging to another; e. g. in fr. 33. pr. D. 7. 1.—fr. 57. § 1. D. ibid.—fr. 12. § 2. D. 7. 8.

(*h*) fr. 26. § 1. D. 47. 2.—fr. 7. § 15. D. 24. 3. —fr. 27. pr. D. 7. 1.—fr. 44. D. 6. 1.

* As long as the fruits remain unsevered from the principal thing (*fructus pendentes, stantes*), they form a *pars rei principalis*; but as soon as they are separated, they are things by themselves. One who uses his land himself, receives the *fructus naturales*; while he who lets his land receives their equivalent in rent, called *fructus civiles*. As *fruits* comprise only such things as are *produced* by the thing possessed (e. g. corn, vegetables, wool, milk, lambs, calves, &c.), it follows that a treasure discovered on the land is not included in the grant of the fruits. *Fructus mere naturales* are such as are produced solely by the powers of nature (e. g. wool, milk, metals, the increase of live stock, &c.), in contradistinction to the *fructus industriales*, which require and suppose industry on the part of the occupant (e. g. corn). Another distinction, though not mentioned by Mackeldey, is that between *fructus extantes* and *consumti*. Fruits are called *extantes* while they continue in the possession of him who has gathered them; *consumti* when they have been consumed, disposed of, or lost. *Fructus percipiendi*, or neglected fruits, come into consideration particularly in the case where the defendant, who is in unlawful possession of a *res frugifera*, is sued as a *malæ fidei possessor*, by an *actio in rem*; for he is obliged to give compensation not only for the fruits he really enjoyed, but also for such as he *might* have obtained by the highest degree of industry, or such as the prosecutor would have obtained, if the thing had not been withheld. In order to determine the precise amount of compensation to be made for the fruits, the expense of raising and gathering them must be deducted from their entire value (fructus non intelliguntur, nisi deductis impensis).

when they are separated from it, they are called *fructus separati*. If one who derives from the proprietor his right to enjoy the fruits of a thing, e. g. a tenant or usufructuary, has undertaken the separation of the fruits, and has thus obtained possession of them, the fruits are called *fructus percepti*.[a] 2. *Fructus*, in an improper sense, means the compensation which a man receives from another for the use or enjoyment of a thing, or for being deprived by him of the use of a thing, e. g. interest, rent, &c.[b] Fruits, in the proper sense, are now termed *fructus naturales*;[c] while, on the contrary, all revenues and recompenses which are not fruits properly speaking, although juridically regarded as such, are called *fructus civiles*.[d]

B. Impensæ in rem collatæ.

§ 155. As the plaintiff is entitled to demand, together with the principal thing, *omnem causam rei*, so on the other hand he is often bound to make good to the defendant the *impensæ in rem collatæ*, by which is understood all that the latter has expended for its advantage. If such expenses were necessary in order to keep the thing from perishing or to preserve it from deterioration, they are called *impensæ necessariæ*; but if they served merely to improve the thing itself and to increase the income from it, they are called *impensæ utiles*. All other outlays, as for instance those intended only to increase the agreeableness of the thing, or for the personal enjoyment of the occupant, are termed *impensæ voluptuariæ*.[e] Compensation for the *impensæ necessariæ* employed upon another's property may generally be claimed by every one except a thief;[f] with respect to the repayment of *impensæ utiles*, no general rule can be laid down; and as regards the *impensæ voluptuariæ*, the occupant has only a right to remove them (*jus tollendi*), and that only provided the thing removed be still of some use after the separation, and that the owner does not prefer to make compensation for it.[g] An *action* for the recovery of such expenditures can be brought only in cases where it is expressly granted, as e. g. in the *judicia divisoria*; in other cases the

(*a*) The difference between *fructus separati* and *percepti* is expressly recognised in fr. 13. D. 7. 4. "Julianus ait fructuarii fructus tunc fieri, cum eos perceperit, bonæ fidei autem possessoris mox, quam a solo separati sunt." Comp. fr. 12. § 5. D. 7. 1.—fr. 25. § 1. D. 22. 1.—fr. 48. pr. D. 41. 1. *Savigny*, Besitz. § 22. a. Fruits that could have been obtained, but which culpa possessoris percepti non sunt, are now called *fructus percipiendi*. § 2. J. 4. 17.—fr. 62. § 1. D. 6. 1.

(*b*) fr. 29. D. 5. 3.—fr. 34. D. 22. 1. "Usuræ vicem fructuum obtinent: et merito non debent a fructibus separari." That *interest* does not strictly belong to fruits, is clearly stated in fr. 121. D. 50. 16. "Usura pecuniæ, quam percipimus, in fructu non est; quia non ex ipso corpore, sed ex alia causa est, id est nova obligatione." But comp. fr. 36. fr. 38. § 13. D. 22. 1.—fr. 62. pr. D. 6. 1.—fr. 88. § 3. D. 35. 2.

(*c*) With respect to these, sometimes a distinction is made between the so-called fructus *mere naturales* and *industriales*. Comp. fr. 45. D. 22. 1.—fr. 48. pr. D. 41. 1.

(*d*) *Rudhard* in Gönner's Archiv. Vol. 4. No. 5.

(*e*) fr. 79. D. 50. 16. Comp. D. 25. 1.—*Ulpian*, VI. § 14–17.

(*f*) fr. 1. § 4. D. 33. 4.—const. 5. C. 3. 32.—fr. 13. D. 13. 1.—const. 1. C. 8. 52.

(*g*) fr. 38. D. 6. 1.—Comp. *Höpfner*, Comm. § 894.

demand for repayment of *impensæ* can be made available only by way of exception or retention.[a]

Of Things with respect to Ownership.

A. Things without an Owner.

§ 156. As regards *ownership*, things are either without an owner (*res nullius*), or else they are owned by some certain person (*res alicujus*).[b] To the things *without an owner* belong: 1. the *res communes omnium*, i. e. those things which are used and enjoyed by every one, and the ownership of which may indeed be acquired in single parts, but never as a whole;[c] 2. the *res nullius* properly so called, i. e. those things which, as far as is known, have never yet had an owner, or which, contrary to their owner's will, have ceased to be his property without becoming the property of another;[d] 3. the *res pro derelicto habitæ*, i. e. those which have had an owner, who however has resigned his ownership in them without transferring it to another.[e]

B. Res privatæ, universitatis, et publicæ.

§ 157. Things that *belong to a certain person* may be owned, 1. either by one or more individual persons, in which case they are called *res privatæ*;[f] 2. or by a community, when they are called *res universitatis*;[g] 3. or by a state, and then they are termed *res publicæ*. When, in the two last cases, the use of the things according to their peculiar destination is free to every member of the community, or to every subject of the state, they are termed *res universitatis* and *res publicæ*, in the strict sense of these terms;[h] but when they are destined merely to subserve the general purposes of the community or state, so that the revenue from them goes to the treasury of such community or state, they are now called *patrimonium universitatis* or *civitatis*.[i]

(*a*) fr. 48. D. 6. 1.—fr. 14. § 1. D. 10. 3.

(*b*) Inst. 2. 1.—Dig. 1. 8.—*Gaius*, 2. 1. seq. —*Buchholtz*, Vers. No. 7.

(*c*) § 1. J. ibid.—fr. 51. D. 18. 1.

(*d*) § 12. 18. J. ibid. There are also things quæ nullius in bonis sunt, sed alicujus in bonis esse creduntur; for instance the res publicæ and res hereditariæ antequam aliquis heres existit. fr. 1. pr. D. 1. 8.—fr. 31. § 1. D. 28. 5.—fr. 34. D. 41. 1.

(*e*) § 47. J. ibid.—Comp. Dig. 41. 7.—*Höpfner*, Comm. § 272.

(*f*) fr. 1. pr. D. 1. 8. Publicæ sunt, quæ in nullius bonis creduntur. Privatæ sunt, quæ singulorum sunt.

(*g*) § 6. J. 2. 1.—r. 6. § 1. D. 1. 8.

(*h*) fr. 15. D. 50. 16. The term *res publicæ* was often used by the Romans synonymously with *res communes omnium*, as for instance in § 2. 4. 5. J. 2. 1.—fr. 4. 5. D. 1. 8.

(*i*) In fr 6. pr. D. 18. 1. this kind of public property is called *pecunia populi*, and opposed to those things "quæ in publico usu habentur, ut campus Martius."—See fr. 17. D. 50. 16. *Höpfner*, Comm. § 275.—*Heineccii* Elementa Institt. § 272 seqq.

FOURTH DIVISION.

RIGHTS AND THE PROSECUTION OF THEM.

Rights are either *general*, i. e. such as are founded on *jus commune*; or *special*, i. e. such as are introduced *ex singularitate juris*. Of the latter we shall treat at large in the second chapter.

CHAPTER I.

OF RIGHTS IN GENERAL.

§ 158. Rights may be treated with respect to their *acquisition*, *preservation*, and *loss*.[a] An especial mode of preservation consists in legal prosecution; and it is from this point of view that rights were practically regarded by the Romans. Of this we shall treat in the third chapter. Generally speaking, the acquisition, preservation, and loss of rights are effected either by law,[b] or by voluntary acts[c] termed legal transactions. These are either transactions of a single party (unilateral) or of several parties (bilateral); according as the will of a single person is sufficient, e. g. in making a testament; or as the concurrent will of two or more is requisite, e. g. in a contract.

Form of Legal Transactions.

§ 159. In every transaction, the legal form is to be observed. By this we mean all those legal precepts, on the observance of which the validity of a transaction regularly depends. Such precepts refer, partly to the contents and object of the transaction, in which case they are usually called its *internal form*; and partly to the formalities to be observed in entering upon them, when they are called its *external form*. Hereto belong especially the reducing of the agreement to writing,[d] the presence of witnesses, and the concurrence of the magistrate.[e] Such

(*a*) fr. 41. D. 1. 3. Totum autem jus consistit aut in acquirendo, aut in conservando, aut in minuendo.

(*b*) Here belong also the fictiones juris, e. g. the *fictio legis Corneliæ* in fr. 12. D. 28. 1. and fr. 28. D. 28. 6.—*Altesserræ* de fictionibus juris; of which an improved edition was published by *Eisenhart* at Halle in 1769.—*Gmelin*, Diss. de fictionibus jur. Rom. Tubingen, 1787.—*Reiding*, Diss. de fictionibus apud Romanos. Groningen, 1829.

(*c*) fr. 41. D. 1. 3. *Aut enim hoc agitur*, quemadmodum quid cujusque fiat, aut quemadmodum quis rem vel jus suum conservet, aut quomodo alienet vel amittat.

(*d*) See *Marezoll* in his and Linde's Zeitschrift. Vol. 3. p. 258.

(*e*) The confirmation of legal transactions by public authority is twofold: viz. it is either essentially requisite to the validity of a transaction, for instance § 1. J. 1. 11.—const. 22. C. 5. 37.—const. 13. C. 5. 71; or it is only applied for with a view to greater security. By means of the latter, a transaction invalid by itself cannot be rendered valid. See cap. 1. 4. X. 2. 30. Archiv Civ. Prax. Vol. 4. p. 206. In every confirmation the clause, *salvo jure tertii*, is tacitly understood, i. e. a third person cannot be injured by it, with respect to rights already vested. *Grabe*, Bemerkun-

external formalities are not in general demanded by the Roman law ;[a] but where they are required, they must be observed, at the risk of having the transaction annulled.[b] If it be contended that the necessary external form was not observed, the burden of proof rests with him who affirms that it was.*

Constituent Parts of Legal Transactions.[c]

§ 160. The constituent parts of a legal transaction may be divided into three kinds, viz. 1. That which is *essential* and without which it could not subsist (s. c. *essentialia*). Here, therefore, no change can be made, even by agreement.[d] 2. That which, supposing the transaction to have been actually completed in its essential requisites, is *ipso jure* a *natural consequence* of the same (s. c. *naturalia*). This is therefore understood of itself, without further agreement; although by special agreement it may be varied or entirely dispensed with, which then remains to be proved by the party who relies on such agreement.[e] 3. The *accidental* or accessory agreements in a transaction (s. c. *accidentalia*). Such in general are those things in a transaction (whether an agreement or testament) which are neither essential nor tacitly understood, but must always be expressly determined. To this class belong also the changes which may be effected by agreement in the *naturalia* of a transaction.[f] He who appeals to such special agreements must prove them; except where the completeness and validity of the transaction itself are made to depend thereupon, in which case his opponent must prove that such agreement was never made, or that it has been performed.[g]

gen über die gerichtliche Bestätigung. Rinteln, 1799. *Brede*, Diss. de confirmatione actuum voluntariæ jurisdictionis. Marburg, 1801. *W. H. Puchta*, Freiw. Gerichtsbarkeit, Edit. 2d. Vol. 1st. § 43–45.

(*a*) fr. 4. D. 22. 4.—const. 28. C. 2. 4.

(*b*) const. 5. C. 1. 14. Comp. cap. 64. de reg. jur. in 6to.

(*c*) *Höpfner*, Comm. § 732.

(*d*) If such a change be made, notwithstanding, the effects of it are very different. Comp. fr. 4. fr. 5. § 2. fr. 12. § 1. D. 23. 4.—fr. 1. § 45. 46. D. 16. 3.—fr. 36. 38. D. 18. 1.—fr. 6. D. 41. 6. The essential parts of a legal transaction are again divided into *general* and *special*. The former are such as are requisite in every transaction, the latter such as are requisite only in certain kinds of transactions.

(*e*) fr. 11. § 1. 2. D. 19. 1.—fr. 5. § 4. D. 19. 5.—fr. 24. D. 16. 3.—fr. 3. D. 12. 1.

(*f*) Concerning the accidentalia negotii, see below, § 170–178.

(*g*) Hence wherever a defence is set up that the transaction was conditional, it is in

* This rule must be taken with some allowance. Where the validity of a transaction depends on the observance of certain formalities, (as e. g. a gift exceeding five hundred *solidi*, which is not valid, unless registered,) the *onus probandi*, in case of contradiction, is thrown upon him who maintains that the formality was observed, and who seeks to derive rights from it; though even in this case he is relieved from proof, whenever a presumption of law is in his favour. But where a plaintiff seeks an advantage from, or founds his right of action upon, the omission of the requisite formalities, he is obliged, in case of contradiction, to prove the omission he alleges. He therefore, e. g. who impugns a public document as evidence, on the ground of its being a *testimonium in propria causa* in behalf of its author, or as a *falsum*, is required to prove his allegation.

A. Essential Requisites.[a]

1. With respect to the Person. (*b*)

§ 161. An essential requisite to the validity of a legal transaction, is a *person* who has the power of effecting a change in his rights. For this purpose it is necessary: 1. That he have the exercise of his *reason* and *freewill;* hence children,[c] madmen, and lunatics[d] (except in lucid intervals) are incapable of taking part in a legal transaction. Acts also that have been performed in a fit of drunkenness[e] or rage,[f] where the party could not have considered their consequences, are likewise held to be invalid. 2. That he be recognised by the state as a *perfect* and *independent person;* hence persons who are still under parental authority or under guardianship, are restricted in many respects as regards the performance of legal transactions.

2. With respect to the Object. (*g*)

§ 162. With respect to the *object* of a legal transaction, the following principles are to be observed: 1. Its object cannot be formed of things which do not exist at all; but may consist of things which are about to exist, or which at least may come into existence.[h] Again, it cannot have for its object either things which are *extra commercium*,[i] or actions which are held to be physically or morally impossible (*contra bonos mores*).[k] 2. It must not be left too general and indefinite as regards its object; and the giving or performing of any thing must not depend on the will of the debtor alone.[l] 3. The transaction must not violate any legal prohibition, or do any injury to the rights of a third person.[m] 4. A promise is likewise invalid which secures no advantage to the person to whom it is made.[n]

the province of him who seeks to derive rights from the transaction, to prove, either that it was transacted *purè*, or that the conditions on his part have been performed.—fr. 10. D. 45. 1.—Glossa ad const. 9. C. 8. 36.—*Hasse* in the Rhein. Mus. Vol. 3. p. 134. Another opinion is maintained by *Gensler* in the Arch. Civ. Prax. Vol. 2. p. 217. and *Bethmann-Hollweg* in his Versuche aus dem Civilprocess. p. 354.

(*a*) In this place only the general requisites of all legal transactions are considered (see § 160. note *d*).

(*b*) See in general *W. H. Puchta*, Freiw. Gerichtsbarkeit. Vol. 1. § 59–65.

(*c*) § 10. J. 3. 19. (20.)

(*d*) § 8. ibid. Comp. fr. 20. § 4. D. 28. 1.—fr. 1. § 3. D. 41. 2.—const. 2. C. 4. 38.—const. 9. C. 6. 22.—const. 6. C. 5. 70.

(*e*) can. 7. C. 15. qu. 1.—cap. 14. X. 3. 1.

(*f*) fr. 48. D. 50. 17. fr. 3. D. 24. 2. speak properly of nothing but divorce.

(*g*) Comp. *Puchta*, l. c. § 72–75.—*Savigny*, System d. R. R. Vol. 3. p. 307 seqq.—*Höpfner*, Comm. 8th Edit. § 737.

(*h*) pr. § 1. J. 3. 19. (20.)—fr. 15. pr. D. 20. 1. fr. 11. § 3. D. 20. 4.—fr. 8. pr § 1. fr. 34. § 2. D. 18. 1.—fr. 11. § 18. D. 19. 1.—fr. 73. D. 45. 1.—fr. 17. pr. D. 32.—§ 7. J. 2. 20.

(*i*) § 2. J. 3. 19. (20.)—fr. 83. § 5. D. 45. 1. —fr. 39. § 8–10. D. 30.

(*k*) fr. 31. 185. D. 50. 17. "Impossibilium nulla est obligatio."—fr. 26. fr. 35. pr. § 1. fr. 141. § 4. D. 45. 1.—fr. 112. § 3. D. 30.—fr. 7. § 3. D. 2. 14.—const. 6. C. 2. 3.

(*l*) fr. 8. D. 44. 7.—fr. 17. fr. 46. § 3. fr. 105. § 1. fr. 108. § 1. fr. 115. pr. D. 45. 1.—fr. 7. pr. D. 30.—const. 1. C. 5. 11. For the exceptions to this rule, see fr. 69. § 4. D. 23. 3.—const. 3. C. 5. 11.—fr. 24. pr. D. 19. 2.—*Glück*, Comm. Vol. 4. § 303.

(*m*) const. 5. C. 1. 14.—cap. 28. X. 2. 24.—cap. 2. de pactis in 6to. (1. 18.)

(*n*) fr. 61. D. 2. 14.—fr. 15. pr. D. 8. 1.

3. With respect to Consent.

§ 163. In every legal transaction, it is required that the parties *determine* and *declare* their *will*. The declaration of one's will is made, 1. either *explicitly*, when expressed orally or in writing, by words or intelligible signs used instead of words;[a] 2. or *tacitly*,* which is the case where a person's actions admit of no other reasonable explanation than that he freely consented to the transaction.[b] 3. If a person do not give his consent to a transaction immediately at the outset, but only subsequently, it is called a *ratification* (*ratihabitio*), and this regularly has a like effect with a previous consent.[c]

4. Hindrance to the Exercise of Freewill.

§ 164. It is not sufficient, that a man declare his will; his exercise of it must also be *free* and *seriously intended*. Such a free and serious exercise of will may be hindered, especially by *error*, *fraud*, *force*, and *simulation*.

(*a*) fr. 38. D. 44. 7. "Placuit non minus valere quod *scriptura*, quam quod *vocibus* lingua figuratis significaretur" fr. 52. § 10. D. ibid. "Sed et *nutu solo* pleraque consistunt."

(*b*) fr. 5. D. 46. 8. "Non tantum verbis ratum haberi potest sed etiam *actu*."—fr. 20. pr. D. 29. 2.—§ 7. J. 2. 19.—fr. 2. § 1. fr. 57. pr. D. 2. 14.—fr. 3. § ult. D. 20. 4. The common maxim, *qui tacet consentit*, cannot serve as a general rule. fr. 142. D. 50. 17. "Qui tacet non utique fatetur." fr. 8. § 1. D. 3. 3.—*Härlin*, Von der stillschweigenden Einwilligung. Tubingen, 1814. *Kori*, Stillschweigende Willenserklärung. Naumburg, 1817.

(*c*) fr. 12. § 4. D. 46. 3. "Ratihabitio mandato comparatur."—fr. 16. § 1. D. 20. 1.—fr. 20. pr. D. 13. 7.—const. 7. pr. C. 4. 28.—const. 25 in fin. C. 5. 16. *Hufeland*, Geist d. R. R. P. 1. No. 4. p. 297.

* It is surprising that, in treating of the doctrine of tacit consent, there should be such a general confounding of the two legal principles, "*qui tacet consentit*," and "*qui tacet non utique fatetur*." Into this error Mackeldey likewise falls. Now these two rules apply to matters that are wholly distinct. *Consensus* belongs to the doctrine of contracts alone; while *confessio* relates merely to proceedings. *Consensus* may establish a legal transaction, and does not admit of recall; while *confessio* cannot originate a legal transaction, and is liable to be recalled. *Confessio* necessarily presupposes as its object something disadvantageous to its author; but *consensus* does not. It is therefore utterly erroneous to apply to cases that come under the head of *consensus*, a principle that is affirmed of *confessio* alone. That Paulus had only confession in his mind when he laid down the rule in fr. 142. D. de reg. jur. is incontestibly proved by his use of the words *fateri* and *negare*: thus he says, "qui tacet non utique *fatetur*; sed tamen verum est, eum non *negare*." The canon law contains the same views as those which the Editor here advances, as will be seen on a reference to reg. 43 and 44 de reg. jur. in 6to., where Bonifacius first sets up the rule (43), "qui tacet consentire videtur;" and then says further (44), "is qui tacet non fatetur; sed nec utique negare videtur." Were both these rules to be applied to one and the same object, a direct contradiction would ensue; a supposition which is here wholly inadmissible, where the two rules follow the one immediately after the other. The fact that silence does not in *every* case imply consent, doubtless misled the jurists into regarding the rule, "qui tacet consentit," as of too sweeping a nature; the consequence of which was that they pressed Paulus's declaration into the service, for justifying that restriction of it which they held requisite. Now that consent cannot always be inferred from silence is certainly true; for every conclusion presupposes an unequivocal premiss, and, as the Pandects show by many examples, consent can be inferred only from an unequivocal silence or from a conclusive act, i. e. from a silence or an act which admits of no

a. Error and Ignorance.

§ 165. *Error* and *ignorance* (*error et ignorantia*), though different in meaning, are alike in respect to their legal consequences. A man *errs* when he has a wrong conception of a thing; he is *ignorant* when he knows nothing about it. If the error or ignorance concern a principle or provision of law, it is *error s. ignorantia juris;* but if it relate to a fact, it is *error s. ignorantia facti.*[a] As to the effect of error and ignorance on legal transactions, the following principles are to be noticed:

I. There are cases in which the *error* or *ignorance* of a party does not excuse, whether it be an *error juris* or *facti.* Here consequently error cannot be alleged, and the party by whom it was committed must always suffer the injury it produces.[b]

II. On the other hand, there are cases in which a man absolutely may allege error, and where consequently he will never suffer from it, be it *error juris* or *facti.*[c]

III. But in all other cases, the distinction between *error juris* and *facti* holds good, and forms the foundation of the doctrine of error. A. As regards *error juris*, this regularly has an injurious effect,* wherever it might have been avoided by applying to a lawyer for ad-

(*a*) Dig. 22. 6.—Cod. 1. 18.—*Cujacii* Recitat. ad tit. Dig.; in his works Vol. 7. p. 928 seqq.—*Duareni* Comm. ad Cod. 1. 18.—*Donelli* Comm. lib. 1. cap. 18–23.—*Roth*, Nonnullæ observatt. ad tit. Dig. de juris et facti ignorantia. Gottingen, 1804.—*Herrmann*, Von den Wirkungen des Irrthums. Wetzlar, 1811. and extracts of it in Löhr's Mag. Vol. 4. (2) No. 4.—*Hufeland*, l. c. P. 1. No. 5.—*Mühlenbruch* in the Archiv Civ. Prax. Vol. 2. No. 35.—*Seuffert*, Erörterungen. Division 1. No. 11.—*Kritz*, Rechtsfälle. Vol. 1. p. 244–343. *Savigny*, System d. R. R. 3d Vol. Supplement 8.

(*b*) For instance, fr. 4. 15. D. 28. 1.—const. 12. C. 6. 23.—§ 12. J. 1. 10.—const. 1. 6. C. 5. 6.—const. 5. 9. C. 1. 14.—const. 4. C. 5. 5.

(*c*) For instance, fr. 19. 20. D. 39. 3.—fr. 22. D. 29. 2.—const. 4. 5. 8. C. 1. 18.—*Thibaut*, System. § 145–147.

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other interpretation than that consent was intended; consequently, when Bonifacius omitted to say in full, "qui tacet *ubi voluntatem exprimere potuit et debuit*, consentit," common sense dictates, that the limitation must be understood, as being implied in the rule itself.

* The maxim that "*error juris nocet*," is a necessary one, generally speaking, with regard to the laws of a country. Every one is bound to know the laws under which he lives or transacts his business. In criminal jurisdiction, where higher interests and considerations are brought in question, the rule is not to be carried out with such strictness as it is in the private law; whence it is said in fr. 108. D. de reg. jur.: "Fere in omnibus pœnalibus judiciis, et ætati et imprudentiæ succurritur." It is true, the latter is done also in the private law; but here it is limited to such exceptions as the law expressly or tacitly makes. *Error juris* moreover may manifest itself in many different ways: it may relate to the capacity of persons for disposing of their property, to the observance of requisite formalities, to the benefits granted by the laws, &c. Ignorance and error respecting *both law and fact*, are never taken into account in cases where the law has affixed certain necessary consequences to acts, without regard to knowledge or the want of it, as e. g. to the omission of prescribed forms, the doing of a forbidden act, or the fulfilment of a natural obligation. On the contrary, they are always taken cognizance of, where the act depends on free resolve and consent; since *errantis voluntas est nulla voluntas*. Although error and ignorance, according to the rigour of the law, merit no excuse or indulgence, yet the equity of the Roman law has admitted under certain circumstances and for certain persons the exceptions which are given above in

vice (*error juris nocet*),[a] but if the party who makes the mistake is excusable because he had no opportunity of consulting a lawyer respecting his right (*si copiam Icti non habuit*), the two following cases are to be distinguished: 1. either the party, in consequence of the error committed, would merely lose an advantage (*lucrum*), and then the error proves injurious to him;[b] or, 2. he would suffer an actual loss of property (*damnum*). Now in the latter case he cannot reclaim a *payment* which he has made in consequence of an error of law (*damnum rei amissæ*),[c] but he needs not perform a *promise* which he has given from a like error (*damnum rei amittendæ*).[d] 3. These general rules, however, are liable to exception in the cases of *minors*, *soldiers*, and persons who lack common education to a degree that renders them wholly rude and uncultivated (*ob rusticitatem*). Persons of this description are not to suffer by an *error juris*, whether *in lucris* or *in damnis*, even though it might have been avoided;[e] and the like holds good respecting *females*, who are not to suffer from an *error juris* in case of a *damnum rei amittendæ*, though they may have been able to avoid it. It does not apply, however, to a *lucrum* or a *damnum rei amissæ*,[f] unless they have made payment in consequence of an obligation which was entirely void.[g] B. The *error facti* has regularly no injurious effect as regards either *lucra* or *damna*,[h] provided however that it did not proceed from gross and inexcusable negligence.[i] An *error facti proprii* is not in itself an inexcusable error, unless made so by aggravating circumstances.[k] On the other hand, it is not necessary in order to avert the injurious effects of error, that a man should have proceeded with over-anxious care and circumspection.[l]

(*a*) fr. 9. pr. § 3. D. 22. 6.—fr. 10. D. 37. 1.—const. 9. C. 1. 14.—const. 12. C. 1. 18.

(*b*) fr. 7. fr. 9. § 5. D. 22. 6.—const. 9. C. 6. 50.

(*c*) fr. 32. § 2. D. 12. 6.—const. 10. C. 1. 18.—Most jurists are indeed of a different opinion, but const. 10. cit. is against them. See below, note *g*.

(*d*) fr. 8. D. 22. 6.—fr. 36. D. 45. 1.—fr. 5. § 1. D. 19. 1.

(*e*) With respect to minors and soldiers fr. 9. pr. § 1. D. 22. 6.—fr. 7. § 6. D. 4. 4.—const. 1. 11. C. 1. 18.—const. 2. C. 2. 33.—const. 22. pr. C. 6. 30.—const. 5. C. 9. 23.; and concerning the rustici: fr. 1. § 5. D. 2. 13.—fr. 2. 7. D. 49. 14.—fr. 3. § 22. D. 29. 5.—const. 8. C. 6. 9.

(*f*) fr. 2. § 7. D. 49. 14.—fr. 8. 9. pr. D. 22. 6.—const. 3. 10. 13. C. 1. 18.

(*g*) Thus const. 10. C. 1. 18. and const. 9. C. 4. 29. are easily reconciled.—Comp. also fr. 32. § 2. D. 12. 6.—fr. 14. § 7. D. 11. 7.—fr. 27. § 1. D. 3. 5.—const. 11. C. 2. 19.—*Braun*, Erörterungen. § 145 seqq.

(*h*) fr. 2. 4. 8. 6. pr. D. 22. 6.—fr. 1. § 1. D. 12. 6.—const. 7. 10. C. 1. 18.

(*i*) fr. 3. § 1. fr. 6. fr. 9. § 2. D. 22. 6.—fr. 5. § 1. D. 41. 10.—fr. 15. § 1. D. 18. 1.

(*k*) fr. 22. fr. 32. § 1. D. 12. 6.

(*l*) fr. 6. D. 22. 6.

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the text. If one who belongs to the favoured class of persons has paid any thing under mistake, the adversary who disputes the error must prove that the payment received was actually due; because he who demands restitution has, by the beneficence of the law, the presumption in his favour.

IV. He who pretends that he erred, is bound to prove it; unless he belongs to the class of persons who are protected against error, or there is some legal presumption in his favour.[a]

b. Fraud and Deception. (b)

§ 166. *Fraud* (*dolus*) in general, is every intentional misrepresentation of the truth, made to induce another to perform an act which he would not else have undertaken. In this wider sense, the Roman law distinguishes between *dolus bonus* and *dolus malus*. The former is that which a man may employ in self-defence against an unlawful attack, or for some other justifiable purpose; as e. g. if a man dissemble the truth, in order to prevent a lunatic from injuring himself or others.[c] *Dolus malus*, or *dolus* simply, exists whenever a man knowingly and intentionally endeavours to injure another by fraudulent delusion or other unlawful means; and this we term deception, fraud, or cheating.[d]

c. Force and Fear. (e)

§ 167. *Force* and *fear* (*vis et metus*) bear to each other in general the relation of cause and effect. Force principally consists in threats of evil; in order, by means of the fear thus excited, to induce a person to perform an act injurious to himself.[f] Force has an influence on legal transactions only when it is unlawful,[g] and when the threatened evil is imminent and of a kind to make an impression upon a *steady, sensible person*.[h]

d. Simulation.

§ 168. *Simulation* consists in a misrepresentation or concealment of the truth; and it takes place especially when one or both of the parties pretend to perform a transaction different from that in which they really

(*a*) fr. 25. pr. § 1. D. 22. 3.—*Thibaut*, Vers. Vol. 2. No. 4. § 6.—*Röder*, Abh. über prakt. Fragen des Civilrechts. Nos. 2 and 3.

(*b*) Dig. 4. 3.—Cod. 2. 21.—*Pauli* sent. rec. 1. 8.

(*c*) fr. 1. § 3. D. 4. 3.—*Otto*, Diss. de dolo bono ad L. 1. § 3. D. de dolo malo. Duisburg, 1720.—*Schott* de dolo malo. Leyden, 1814. *Buckholtz* in his Jur. Abh. No. 21. denies the existence of the dolus bonus in Justinian's law.

(*d*) fr. 1. § 2. D. ibid.—"Labeo sic definiit, dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera est." Comp. fr. 7. § 9. D. 2. 14.—fr. 7. § 3. 8. fr. 8. fr. 9. § 2. fr. 37. D. 4. 3.—fr. 6. § 9. fr. 11. § 5. D. 19. 1.—fr. 35. § 8. fr. 57. § 3. D. 18. 1.—fr. 16. § 1. D. 19. 5. fr. 2. § 3. 5. D. 44. 4.—fr. 36. D. 45. 1.—fr. 23. D. 50. 17.—*Thibaut*, System. § 150 seqq.—*Höpfner*, Comm. § 734.

(*e*) Dig. 4. 2.—Cod. 2. 20. and Cod. 7. 67.—*De Tiennes* de eo quod metus causa gestum erit jure Romano. Louvain, 1824.

(*f*) fr. 1. 2. D. 4. 2. In the Roman law, however, *vis* only means physical force; *metus* denotes every other, especially mental compulsion.

(*g*) fr. 3. § 1. D. ibid.—Unlawful force is considered as dolus. fr. 14. § 13. D. ibid.—fr. 2. § 8. D. 47. 8.

(*h*) fr. 5. 6. D. 4. 2. "Metus non vani hominis, sed qui merito et in constantissimum hominem cadat." fr. 7. 9. D. ibid.—const. 9. C. 2. 20. He who only consents to an act out of mere respect to another (s. c. metus reverentialis) is not to be considered as acting under compulsion. fr. 1. § 6. D. 44. 5.—const. 6. C. 2. 20.

are engaged,[a] whether it be done with a good, an indifferent, or an evil intent; though in this last case,[b] simulation assumes the nature of fraud.*

B. Nature of Legal Transactions.

§ 169. By the *nature* of a legal transaction is understood every thing which follows *ipso jure* as a consequence and effect of such transaction as soon as it is essentially completed, so that it is understood of itself without being specially agreed upon. These natural qualities of legal transactions, together with their consequences and effects, are determined by the laws; and are assumed to subsist, until it is proved that something different has been agreed upon (§ 160). Moreover, such alteration by agreement is regularly allowed,[c] provided it does not conflict with an express prohibition.[d]

C. Modifications of their Nature.†

§ 170. The accidental modifications of a legal transaction are always founded on a particular agreement of the parties, or a special declaration of the testator; so that they can never be taken for granted, but must be proved by him who appeals to them.[e] They relate partly to the *modality* of the transaction, i. e. to the manner and conditions under

(*a*) fr. 30. D. 23. 2.—fr. 12. D. 39. 3.—fr. 55. D. 18. 1.—fr. 3. § 2.—D. 44. 7.—const. 17. C. 4. 29.—Cod. 4. 22.

(*b*) fr. 7. § 9. D. 2. 14.—fr. 49. pr. D. 19. 1.

(*c*) *Thibaut*, System des Pand. R. § 133.—*Bucher*, Forderungen, § 32 seqq.—*Hopfner*. Commentar. § 732.

(*d*) For instance, fr. 11. § ult. D. 19. 1.—fr. 70. D. 17. 2.—fr. 4. D. 13. 7.

(*e*) See above, § 160. note *g*.

* It is incorrect to say that simulation exists where *one* of the contracting parties acts with a fraudulent intent; for that is simply a case of *dolus*. Simulation consists merely in feigning a transaction different from that which is actually to take place between the parties. If, for instance, I convey a house by gift to a person, but give the transaction the appearance of a sale, although I remit its price, the transaction is to be regarded not as a sale, but as a gift.

† In every transaction it is necessary to distinguish its *essential*, *natural*, and *accidental* parts (*essentialia*, *naturalia*, *et accidentalia*). 1. Every thing which is absolutely necessary and immutable as regards the form, the contents, and the effects of a transaction, constitutes its *essence*. For instance, it is an essential requisite of every transaction, that the parties should fully and clearly declare their will. When the essential parts of a transaction are either varied, or omitted from the transaction itself, it is either converted into another or becomes entirely void. 2. Every thing which is understood of itself without special agreement, as a necessary consequence of the transaction, according to the laws, constitutes the *nature* of a transaction. The *naturalia* are subject to arbitrary change. 3. Every thing in a transaction that is not understood of itself, but rests on especial agreement or arbitrary settlement, forms the *accidental* part of a transaction. The existence of these last, when controverted, must be proved. In a sale, for instance, the thing to be sold and the price to be paid, as settled by agreement, constitute the *essentialia*; the payment of the price on delivery, and the transfer to the buyer of the risk of the thing's perishing, from the time of completing the contract, form the *naturalia*; the conditions and the time fixed on for the delivery of the thing and payment of the price —in fine the place, time, and mode of fulfilling the contract on one side or the other, are the *accidentalia*.

which it shall be and continue obligatory, and partly to the *securing* of its performance.

1. With respect to Modality.

a. *Conditions.* (a)

§ 171. The *validity* and *efficacy* of a legal transaction may be made to depend on a *condition* (*conditio*); by which is understood, in the proper sense of the word, every event that is uncertain,[b] future,[c] and not belonging to the very nature of the transaction,[d] inasmuch as rights may be made dependent upon it by private will or consent. A true condition is: 1. either *suspensive* (*conditio suspensiva*) or *resolutive* (*conditio resolutiva*),[e] according as the beginning or end of a legal transaction is made to depend upon it; 2. either *affirmative* (*conditio affirmativa*) or *negative* (*conditio negativa*), according as the efficacy of a transaction is made to depend upon the performance or omission of some act; 3. either *possible* (*cond. possibilis*) or *impossible* (*cond. impossibilis*), which latter again is either *physically* or *morally* impossible, according as the performance of it is beyond the powers of nature or contrary to the laws and to good morals;[f] 4. either *conditio potestativa*, *casualis*, or *mixta*, according as its fulfilment depends on the ability and will of him whose right is conditioned thereupon, or on accident, or on both together.[g] As long as it is uncertain whether a condition will take effect or not, it is said, *conditio pendet*; when it has actually taken effect, *conditio existit*; and when it is certain that it will not take effect, *conditio deficit*.

(*a*) Dig. 28. 7. and Dig. 35. 1.—Cod. 6. 46.—*Savigny*, System. Vol. 3. p. 120 seqq.—*Rosshirt*, Vermächtnisse. Vol. 1. p. 353 seqq.

(*b*) Concerning the conditio necessaria, see fr. 9. § 1. D. 46. 2.

(*c*) Respecting the "conditio in præteritum vel præsens collata," see § 4. J. 3. 15. (16.)—fr. 4. § 2. D. 2. 14.—fr. 10. § 1. D. 28. 7.—fr. 37. 39. D. 12. 1.

(*d*) With regard to the so-called "conditio intrinseca sive tacita," which is implied in the nature of a transaction, and needs not to be expressed, see fr. 21. fr. 41. § 1. D. 23. 3.—fr. 3. D. 30.—fr. 99. 107. D. 35. 1.

(*e*) In the Roman law a transaction under a suspensive condition is called a *negotium sub conditione* or simply *conditionale*, and the dissolving condition is termed a *conditio quæ resolvit*. For instance, fr. 2. pr. D. 18. 2.—fr. 2. § 3. 4. 5. D. 41. 4.—fr. 3. D. 18. 1.—Compare *Thibaut*, Civ. Abh. No. 17.—*Wening* in the Archiv Civ. Prax. Vol. 1. p. 138.—*Zimmern*, ibid. Vol. 5. No. 9.—*Nettelbladt*, Rechtssprüche des A. G. zu Parchim. (Sentences of the appeal court at Parchim.) P. 3. N. 42.—*Riesser* in Linde's Z. Vol. 2. p. 1. and 270.

(*f*) With respect to the "conditio jurisjurandi," see fr. 8. pr. § 6. 7. D. 28. 7.—fr. 29. § 2. D. 29. 1.—fr. 112. § 4. D. 30.—fr. 14. § 1. D. 32.—fr. 20. fr. 26. pr. fr. 97. D. 35. 1.—*Huschke*, in Linde's Z. Vol. 14. No. 3.—Si divortium feceris, const. 5. C. 6. 25.—Si non nupseris, fr. 72. § 5. fr. 79. § 4. fr. 100. fr. 62. § 2. fr. 63. pr. fr. 64. pr. D. 35. 1.—const. 2. 3. C. 6. 40.—Nov. 22. c. 43. 44.—si nupseris, fr. 10. pr. fr. 15. fr. 63. § 1. fr. 28. pr. fr. 71. § 1. fr. 101. pr. D. 35. 1.—fr. 23. D. 28. 7. As to the "conditio si non nupseris" see *Scheppler*, Verlieren Unverheirathete, im Falle der Bedingung ledig zu bleiben, die Erbschaft wenn sie sich verheirathen? Jena, 1749; and with regard to the "conditio viduitatis" see *Zimmern*, R. G. Vol. 1. § 173.—*Löhr* in the Arch. Civ. Pr. Vol. 16. p. 48.—On all the conditions here mentioned, see *Jäger* in Linde's Z. Vol. 3. p. 310. The conditio religionis mutandæ et non mutandæ is always void, arg. const. 5. C. 6. 25. *Thibaut* is of another opinion: see his Syst. § 803. and *Salchow*, Mag. für positive Jurisprudenz. P. 1. p. 65. both of whom consider that condition to be always admissible; and *Günther* and *Hagemann* in the Archiv Civ. Prax. Vol. 3. No. 8. who consider it a valid condition only in case it is directed to induce one to retain his religion. But see also *Jäger*, l. c. p. 216 seqq. *Rosshirt*, l. c. p. 358 seqq.—*Sell*, Versuche II.

(*g*) const. un. § 7. C. 6. 51.—*Rosshirt*, l. c. Vol 1. p. 371 seqq.—*Höpfner* Comm. § 490. 740.

b. Dies.

§ 172. A *specification of time* (*dies*) may be annexed to the transaction, by private will. The *dies* is either a so-called *dies a quo*, or *ad quem*, according as the commencement or conclusion of a transaction depends upon it.[a] In each case it is either a *dies certus* or *incertus*: it is a *dies certus*, when it is certain not only that it will come, but also at what time it will come; and a *dies incertus*, when *both* or *either* of these is doubtful. A *dies incertus* is regularly regarded as a condition.[b] With respect to the *dies a quo*, both the following expressions are to be noticed: viz. *dies cedit*, which signifies that the day has arrived on which a right is acquired; and *dies venit*, which is used to intimate that the day is come on which the creditor can sue his debtor for the object of his right.[c]

c. Modus.

§ 173. *Modus* denotes in general, every imposing of a secondary obligation, through which he who designs to grant any thing to another limits his promise by demanding a certain performance in return for what he gives, and by charging the person who receives it with an obligation to that effect.[d] Such a *modus* may occur not only in gratuitous but also in onerous transactions:[e] with this distinction however, that in the former case, the giver has the choice, when the *modus* is not fulfilled, of bringing an action either to enforce the performance of it, or for the return of the gift;[f] while in the latter case, he can sue only for the performance of the *modus*,—unless the receiver need not fulfil it, for the reason that no one besides himself is interested in its performance.[g]

(*a*) The Romans distinguished the *dies a quo* by "stipulari ex die" or "stipulatio confertur in diem," and the *dies ad quem* by "stipulari ad diem." fr. 44. § 1. D. 44. 7.—§ 2. J. 3. 15. (16.)—fr. 56. § 4. D. 45. 1.

(*b*) fr. 75. D. 35. 1.—fr. 56. fr. 16. § 1. D. 12. 6.—fr. 45. § 3. D. 45. 1.—fr. 4. pr. fr. 22. pr. D. 36. 2. Comp. const. 3. 5. C. 6. 53.

(*c*) fr. 213. pr. D. 50. 16. On the computation of time in general, see § 187.

(*d*) Cod. 6. 45. and Cod. 8. 55.—fr. 17. § 4. D. 35. 1. The modus often contains at the same time a condition. For instance, fr. 21. fr. 41. pr. § 1. D. 23. 3.—fr. 4. § 2. D. 2. 14.—fr. 80. D. 35. 1. Or it is made a condition, and then the transaction must be treated as conditional. Concerning the material difference between "modus" and "conditio," see especially *Pfeiffer*, Pract. Ausführungen. Vol. 1. p. 24. Upon the fr. 80. cited comp. *Sammet*, Hermeneutik, § 58. and *Sintenis* in the German translation of the Corpus Juris. Vol. 3. p. 631. —*Braun*, Erörterungen. p. 154–158. —*Lehmann*, Diss. de modo negotiis adjecto. Leipsic, 1833.

(*e*) fr. 41. pr. D. 18. 1.—fr. 58. § 2. D. 19. 2. Contra: *Wächter*, Doctrina de condictione *causa data causa non secuta*. Tubingen, 1822. p. 89.

(*f*) const. 3. C. 4, 38.—const. 9. C. 8. 54.—const. 1. C. 8. 55.—const. 2. 3. 8. C. 4. 6. Many jurists, as Dr. Rosshirt adds here, limit the general views of *modus* stated in the text, by making it refer solely to lucrative transactions; and this too in such manner that something must be performed with that which is obtained by means of such lucrative transaction.

(*g*) fr. 41. pr. D. 18. 1.—fr. 17. § 2. fr. 44. D. 40. 4.—fr. 13. § 2. D. 24. 1.—The doctrine of modus is of especial importance with respect to legacies and also to the donatio sub modo. Rosshirt proposes to restrict it to these, because it did not even apply to heredis institutio. See *Rosshirt*, Vermächtnisse. I. p. 406. —*Meyerfeldt*, Von den Schenkungen I. 338.

d. Causa.

§ 174. In a legal transaction a *causa* may also be adduced, which here signifies the same as motive.[a] The rule with respect to this is, *Falsa causa non nocet:* unless it can be proved that, but for the error, the transaction would not have been entered upon;[b] or unless the *causa* is expressed at the same time as a condition, in which case it must be treated accordingly.[c]

e. Demonstratio.—Nudum Præceptum.

§ 175. An accessory designation of persons or things by circumlocution is called *demonstratio.*[d] This often occurs in testaments. It has not the quality of a *conditio*, and can be of importance only with regard to interpretation. Consequently a *falsa demonstratio* has no injurious effect; whence the maxim, *quicquid demonstratæ rei additur satis demonstratæ frustra est.*[e] The *nudum præceptum* is a command which has not even the force of a *modus*, and therefore it is likewise regarded as nothing more than a *demonstratio.*[f]

2. Confirmation of the Transaction.

a. Oath.

§ 176. For the stronger confirmation of a legal transaction, an *oath* is sometimes used.[g] By an *oath* (*jusjurandum, s. juramentum*), in the strict sense of the term, is understood an affirmation or asseveration, accompanied by an invocation of the Deity as a witness to its truth. Such an oath is taken in order either to confirm a promise (s. c. *juramentum promissorium*), or to give assurance of the truth of an assertion (s. c. *juramentum assertorium*). What effect a promissory oath (with which alone we have here to do) has with regard to the promise itself, is a disputed point. According to the Roman law, thus much is certain, that it produces no new obligation, but only confirms one already existing; so that in a transaction which is invalid in itself, it remains without effect.[h] The canon law, on the contrary, maintains the doctrine, that every

(*a*) §. 31. J. 2. 20.—fr. 3. D. 39. 5.
(*b*) fr. 72. § 6. D. 35. 1.—fr. 9. pr. D. 28. 5.—fr. 5. §. 1. D. 19. 1.—const. 4. C. 8. 24.
(*c*) § 31. J. 2. 20.—fr. 17. § 2. 3. D. 35. 1.—fr. 9. § 2. fr. 58. D. 18. 1.
(*d*) *Rosshirt*, Vermächtnisse. Vol. 1. 330.
(*e*) fr. 1. § 8. D. 33. 4.
(*f*) *Rosshirt*, l. c. p. 407. 411.
(*g*) Dig. 12. 2.—Cod. 2. 59. and Cod. 4. 1.—Decretal. 2. 24.—Lib VItus. 2. 11. Clem. 2. 19.—*Malblanc*, Doctrina de jurejurando. Nuremberg, 1781. 2d Edit. Tubingen, 1820. *Quandt*, Flores sparsi ad doctrinam de jurejurando. Leipsic, 1789.—*Weber*, Von der natürlichen Verbindlichkeit. § 118–123.—*Glück*, Comm. Vol. 12. § 789 seqq.—*Falck*, Eranien zum deutschen Rechte. 2d No. p. 90.—*Mirus*, Observationes de jurejurando. Berlin, 1828.—*F. Bayer*, Betrachtungen über den Eid. Nuremberg, 1829.—*Rosshirt*, de jurisjurandi religione. Heidelberg, 1829.—*Muller*, Diss. de jurejurando canonico speciatim promissorio. Bonn, 1831.
(*h*) fr. 7. § 16. D. 2. 14.—const. 5. § 1. C. 1. 14.—*Schorcht*, Von der Ungültigkeit des Eides bei ungültigen Verträgen. Jena, 1786.—*Glück*, Comm. Vol. 4. § 341.—*Reinhardt*, Verm. Aufs. P. 1. No. 10.—*Bülow* and *Hagemann*, Pract. Erört. Vol. 4. No. 31. With regard to the Auth. *Sacramenta puberum* C. 2. 28. see *Savigny*, R. R. im M. A. Vol. 4. p. 162.—*Pfeiffer*, Pract. Ausführungen. Vol. 3. p. 169.—*Hüpfner*, Comm. 8th Edit. § 804.

oath taken considerately and voluntarily, unless it has for its object an act which is unlawful in itself or contrary to the rights of a third person, creates an especial obligation towards God; and that consequently every promise destitute of legal effect is rendered obligatory by an accompanying oath.[a]

b. Conventional Penalties. (b)

§ 177. Another special means of insuring the performance of agreements, is that of a *conventional penalty* (*stipulatio pœnæ*). By this term is understood, every forfeiture which one contracting party binds himself by an accessory agreement to yield to the other, in case he should fail to perform the principal contract, either altogether or at the appointed time.[c] This penalty is incurred as soon as the debtor is in arrears; and it then rests with the creditor to choose, whether he will sue for the recovery of the penalty or for the performance of the principal agreement.[d] He cannot insist on both together, unless this has been expressly agreed upon.[e]

c. Arrha.

§ 178. In some kinds of contracts the parties make frequent use of the so-called *arrha* (*earnest-money*),[f] by which is understood a sum given at once by one contracting party to the other for the further confirmation of the transaction, whether it be done before or after the transaction is fully completed. In the *first* case,[g] either party is still at liberty to withdraw from the transaction: if this be done by the giver of the *arrha*,

(*a*) cap. 28. X. 2. 24.—cap. 2. de pactis in 6to. In case the transaction which is confirmed by oath belongs to the class that are positively prohibited, or in case it is invalid because the requisite consent of the parties is wanting, a *relaxatio juramenti* takes place. cap. 6. 8. 15. 20. X. 2. 24. See especially *Walter*, Kirchenrecht. § 362. — *W. H. Puchta*, Handb. freiw. Gerichtsb. P. 1. § 83.—*Marezoll* in his and Linde's Z. Vol. 1. p. 28. It is not determined whether the provision of the canon law applies also among the evangelical denominations. This is denied by *Weber*, l. c., but is affirmed by *Thibaut*, Syst. § 114.—*Gesterding*, Nachforschungen, P. 1. p. 73. Comp. also *Malblanc*, l. c. § 79.—*Burchard* de effectu jurisjurandi promissorii præcipue renunciationibus beneficiorum adjecti. Rostock, 1789. *Pfeiffer*, l. c. p. 173.

(*b*) *Kersten* de pœna conventionali. Leipsic, 1839.

(*c*) § 7. J. 3. 15. (16.)—§ 19. J. 3. 19. (20.)—fr. 23. § 16. D. 45. 1.—const. 12. C. 8. 38. Among the Romans the form of a stipulation was required for this, as otherwise no action could be brought.

(*d*) const. 14. C. 2. 3. This penalty is nothing but an arrha, wherever the debtor is entitled, by an explicit agreement, to be released from his obligation on payment of the penalty.

(*e*) fr. 10. § 1. D. 2. 14.—const. 17. C. 2. 4. —fr. 115. § 2. D. 45. 1.—*Thibaut*, System des Pand. R. § 115.

(*f*) pr. J. 3. 23. (24.)—fr. 35. pr. D. 18. 1.—*Thomasius* de arrhis emtionum; in Diss. academ. Vol. 2. No. 58.—*Reuter* de arrha pacto imperfecto data. Halle, 1747.—*Gottschalk*, Discept. for. Vol. 2. cap. 30.—*Zumbach* de arrha contractuum. Jena, 1828.

(*g*) This case especially occurs where the parties to a transaction which is actually settled, have still made its full completion and binding force to depend on its being reduced to writing and signed by both parties.—The Editor may here add, that the difference between *arrha* and *stipulatio pœnæ* is obvious; the latter being a penalty to be paid, and the former a penalty advanced. The latter moreover may have other things than money, and even actions, as its object, provided such actions are not contrary to good morals; for, e. g. a promise on the part of the debtor to suffer himself to be abused by the creditor, in case of non-performance at the proper time, would be invalid.

he loses what he gave; whereas if the receiver withdraws, he must restore double the amount of what he received.[a] In the *second* case, as a general rule, neither of the contracting parties is at liberty to withdraw without the consent of the other;[b] unless the earnest was given with the express understanding that the party should be allowed to withdraw by simply forfeiting the same (s. c. *arrha pœnitentialis*), and then the giver may withdraw by resigning it, or the receiver by restoring double the amount.[c]

Invalidity of Legal Transactions.

§ 179. If in a legal transaction there be any thing wanting which the law requires, whether with respect to its external form or its essential contents, or if it conflict with a legal prohibition, the consequence is that the transaction is invalid (§ 159). 1. According to the Roman law, this invalidity regularly takes place *ipso jure* (*negotium ipso jure nullum, inutile*), even though it be not especially threatened by the law;[d] in such case the transaction has no legal existence whatever (*nihil agitur*), and consequently it is without the intended legal effects, even though the parties themselves should desire to make it good. In other cases, a transaction is to be regarded as invalid only when one of the parties raises an objection (*ope exceptionis nullum*), or when upon his motion it is declared invalid by the judge (*negotium rescinditur*).[e] 2. A transaction, however, is not invalidated by the arising of subsequent circumstances under which it would not have been consented to.[f] 3. Moreover, the nature and validity of a transaction are judged of by its state at the moment of completion;[g] and if a transaction was invalid from the beginning, it does not as a general rule afterwards become valid simply because the reasons against it subsequently cease to exist.[h] 4. By the partial invalidity of a transaction, so much of it as is valid and may subsist by itself does not suffer any detriment.[i] 5. A transaction invalid in itself may often be sustained by *conversion*, i. e. by changing it into another. Such conversion occurs in some cases *ipso*

(*a*) pr. in fin. J. 3. 23. (24.)—const. 17. C. 4. 21. If the transaction be dissolved by the consent of both parties, the arrha is to be returned. fr. 11. § 6. D. 19. 1.—const. 3. C. 5. 1.

(*b*) const. 3. C. 4. 44.

(*c*) const. 6. C. ibid.

(*d*) const. 5. pr. C. 1. 14.—cap. 64. de reg. jur. in 6to. *Vinnii* select. quæst. lib. 1. c. 1. —*Weber*, Von der nat. Verb. § 74.—*Löhr's* Mag. Vol. 4. p. 146.—*Brandis* in Linde's Z. Vol. 7. p. 120.

(*e*) Here belongs especially the exceptio doli mali, quod metus causa (§ 1–5. J. 4. 13.), and likewise the rescissio testamenti inofficiosi, the restitutio in integrum, &c.

(*f*) The common opinion, that the clause *rebus sic stantibus* is tacitly implied in every transaction, is wrong. See *Weber*, l. c. § 90. —*Seuffert*, Erörterungen. Div. I. p. 81.—Comp. *Thibaut*, System des Pand. R. § 201. 992.—*Braun*, Erörterungen. p. 221.

(*g*) fr. 8. pr. D. 17. 1.—fr. 78. pr. D. 45. 1.

(*h*) fr. 29. D. 50. 17. "Quod initio vitiosum est, non potest tractu temporis convalescere." fr. 201. fr. 210. D. ibid.—fr. 1. D. 34. 7. —*Averanii* interpr. jur. lib. 4. c. 21–26.—*Rosshirt's* Zeitschrift. Vol. 3. p. 156.

(*i*) fr. 1. § 5. D. 45. 1. "Utile per inutile non vitiatur." fr. 29. D. 22. 1.—fr. 11. § 1. D. 13. 5.—const. 36. § 3. C. 8. 54.

jure;[a] in others an express declaration is requisite on the part of those concerned in the transaction.[b]

Interpretation of Legal Transactions.

§ 180. The interpretation of legal transactions is of three kinds, viz. *authentica*, *usualis*, or *doctrinalis*; according as it proceeds from the parties themselves, or is founded on the ordinary use of language, or on the rules of juridical hermeneutics.

1. In the *interpretatio authentica*, a distinction is to be made between contracts and testaments. In construing testaments, the doubtful passage must be taken in the sense in which the testator wished it to be understood.[c] The same rule applies to all other acts and instruments which proceed from a single party. But where several parties concur in a transaction, its authentic interpretation presupposes an accordance between them all, and therefore a one-sided explanation given by one of them cannot prejudice the rights of the others.

2. The *interpretatio usualis* applies particularly to cases where in a legal transaction words and phrases are employed, which have a strictly determined sense in the ordinary speech of the place, and it does not appear that the parties employed them in a different meaning.[d] Whenever cases of this kind occur in practice, it is important to ascertain whether the doubt, which arises from the expressions used in the transaction, has not previously presented itself and been removed by judicial decision.[e]

3. In the *interpretatio doctrinalis* the following rules are to be observed: *a*. Every obscure and doubtful passage is to be explained according to the intention of the parties; and this we must endeavour to ascertain from the words, the usage of language, and also from the respective circumstances and relations of the parties to the transaction.[f] *b*. If their real intention cannot be discovered with certainty, the obscure passage must be explained in such a manner as will deviate the least from the nature of the transaction, and hence adversely to him who puts in a claim which deviates from the nature of the transaction, and who ought therefore to have been careful to employ a clearer mode of expression.[g] *c*. If there be a doubt respecting the

(*a*) E. g. when in a contract of sale, it is agreed upon *ne petatur pretium*, the transaction is thereby converted into a gift. fr. 36. 38. D. 18. 1.—fr. 6. D. 41. 6.

(*b*) For instance in the clausula codicillaris fr. 1. D. 29. 7.—const. 8. § 1. C. 6 36.

(*c*) Quisque verborum suorum optimus est interpres. fr. 96. D. 50. 17.—fr. 21. § 1. D. 28. 1.—*Bucher*, Recht der Forderungen. 2d Edit. Leipsic, 1830. § 37.

(*d*) arg. fr. 37. 38. D. 1. 3.—fr. 21. § 1. in fin. D. 28. 1. See also fr. 69. § 1. D. 32.—fr. 9–12. D. 33. 6.

(*e*) E. g. fr. 13. pr. D. 28. 2.—fr. 17. § 1. D. 30.—fr. 10. § 1. D. 34. 5.

(*f*) fr. 219. D. 50. 16.—fr. 67. D. 50. 17.—e. g. fr. 3. § ult. D. 33. 10.—fr. 33. D. 34. 2.—fr. 22. D. 34. 1.—fr. 14. D. 33. 1.—fr. 75. D. 32.

(*g*) Interpretatio facienda est secundum naturam negotii. fr. 3. D. 12. 1.—fr. 11. § 1. 2. D. 19. 1.—fr. 72. pr. D. 18. 1.—Interpretatio facienda est contra eum, qui clarius loqui po-

amount of the debt, the doubtful passage must be explained in such manner as is least unfavourable to the promiser.[a] *d.* And lastly, if, from the words employed in the transaction, it is altogether uncertain and doubtful what the party or parties intended, the transaction is invalid;[b] yet it is a principal of law, that the interpretation of a transaction shall favour its validity as far as possible.[c]

Acquisition of Rights.

§ 181. The acquisition of rights does not necessarily suppose that a legal transaction always precedes it; in fact the law itself,[d] under certain conditions, often makes a transfer of rights without any previous legal transaction. The acquisition of rights, as well by a legal transaction as by mere operation of law, may be most appropriately divided into the three following kinds: viz. 1. *inter vivos* or *mortis causa;* 2. *per titulum singularem* or *universalem;* 3. *per titulum originarium* or *derivativum.* K.

§ 182. We add the following particulars respecting the kinds of acquisition above enumerated:

1. *Acquisitio inter vivos* is distinguished from that which takes place *mortis causa*, by the fact that in the latter the death of the predecessor in the right is always requisite to the perfection of the acquisition, and to the actual transition of the right.

2. In every *successio,*[e] *in singularem rem* as well as *per universitatem*, it is understood of course that a man enters into legal relations already existing; but then, they are distinguished from one another for the reason, that by the former a transfer is made of single rights and duties as such; while by the latter a transfer is effected, not of the single things as such, but as parts of an entire estate, whether in its whole extent or in ideal quotas or shares. According to the modern law, there are only two cases of universal succession; viz. inheritance and confiscation of an entire estate. The characteristics of universal succession are: *a.* the representing of the predecessor, that is to say, the *ipso jure* transmission to the successor of such of the predecessor's rights and duties as are capable of being transmitted; *b.* the subjecting of the estate to a division into quotas.[f]

tuisset ac debuisset. fr. 172. pr. D. 50. 17.—fr. 39. D. 2. 14.—fr. 21. D. 18. 1.—fr. 38. § 18. D. 45. 1.—fr. 26. D. 34. 5.

(*a*) In dubio id quod minimum est sequimur. fr. 9. 34. D. 50. 17. fr. 52. D. 19. 2.—fr. 1. § 4. D. 45. 1.

(*b*) fr. 188. D. 50. 17.—fr. 2. fr. 10. pr. fr. 21. 27. 28. D. 34. 5.

(*c*) fr. 12. D. ibid.—fr. 80. D. 45. 1.

(*d*) Where rights and duties have not arisen through the voluntary acts of the parties, but are to be derived from the laws themselves, it is evident that, some *certain event* must always take place, to which the law may attach such rights. Comp. *Thibaut*, System. § 131.

(*e*) The idea of *successio*, as the word itself indicates, must have a more restricted meaning when applied to family rights: its chief province is the rights of things and obligations. See *Savigny*, System. Vol. 3. p. 11 seqq.

(*f*) Comp. *Hasse* in the Archiv Civ. Prax. Vol. 5. p. 21 seqq. Hence the passing of a

3. The division of the acquisition of rights into *original* and *derivative*, refers to the continuance of a right already existing, as distinguished from one newly created. Hence where there is a succession, the title is always derivative; but where the acquisition takes place without succession, the title is original.[a] K.

Principles applicable to the Acquisition of Rights.

§ 183. Of the general principles which apply to the acquisition of rights, the following are most commonly referred to: 1. No one can transfer to another more right than he himself possesses.[b] 2. Any one may acquire a right *by himself* or *through others;* and that, according to the present law, not only through such persons as are in his power, but also through free representatives.[c] A right already completely acquired is called *jus præsens* (a vested right). Every right the acquisition of which is in prospect only, is called *jus futurum*; and this is either *jus delatum*, when it depends merely on the will of the recipient whether he will acquire it or not,[d] or else *jus nondum delatum*, when its future acquisition depends on other circumstances and conditions, without which the acquisition would be impossible.[e]

Maintenance of Rights.

§ 184. To the means which have for their object the maintaining and confirming of rights, belong: 1. *Protestation*,* i. e. an express decla-

bankrupt's estate into the hands of his creditors is not a universal succession.

(*a*) As instances of original title with regard to *property*, we may mention *occupatio*, *specificatio*, and *accessio*. With regard to the *rights of obligation*, *servitudes*, rights of *pawn* and *mortgage*, *guardianship*, &c. every direct acquisition of newly created rights is obtained by an original title.

(*b*) fr. 54. D. 50. 17. "Nemo plus juris in alterum transferre potest quam ipse habet."

(*c*) The ancient Roman law followed these two principles: 1. That the paterfamilias acquires rights ipso jure by those persons who are under his power: 2. That nobody can acquire rights through personæ extraneæ i. e. persons not subject to his power. Rights therefore could not be acquired through free representatives. *Gaius*, II. 86–96. III. 163–167.—*Ulpian*, XIX. 18–21.—Inst. II. 9. III. 17. (18.) 29. (30.)—fr. 73. § 4. fr. 123. pr. D. 50. 17.—fr. 11. D. 44. 7.—*Hugo*, R. G. p. 233. 299.—fr. 10. 17. 18. 19. 21. 23. D. 41. 1.—Cod. IV. 26. 27.—*Mühlenbruch*, Cession. § 5. 10.—*Burchardi*, System. p. 38.—In regard to the second of these principles, a distinction was made in later times between acquisitiones civiles and naturales; and with respect to the latter, personæ extraneæ were afterwards admitted, provided they had obtained the proper authority (mandatum) to acquire, or their acts were ratified. *Paulus*, V. 2. 2. — § 5. J. 2. 9.—fr. 53. 13. 20. § 2. D. 41. 1.—fr. 41. D. 41. 3. —const. 1. C. 7. 2.—fr. 3. § 7. D. 37. 1. In relation to acquisitiones civiles, the inadmissibility of personæ extraneæ as representatives continued even under the later law, as is shown by fr. 53. D. 41. 1.—fr. 123. pr. D. 50. 17.—const. 1. C. 4. 27.—fr. 90. pr. D. 29. 2. —const. 5. C. 6. 30. The above distinction between acquisitio civilis and naturalis has never been regarded in Germany; consequently there is no such restriction there on the admissibility of representatives.

(*d*) fr. 151. D. 50. 16. "*Delata hereditas* intelligitur, quam quis adeundo possit consequi."

(*e*) See in general *J. H. Böhmer* de jure futuro; in Exerc. ad Pand. Vol. 1. Exerc. 5. p. 143 seq.

* It will be advisable and sometimes necessary to use this means of preserving rights, in cases where a man's right might otherwise be considered as surrendered, because he did not object to the disadvantageous interpretation of an act or event which has refer-

ration by which a man objects to any injurious conclusion that might be inferred from his words or his actions.[a]

2. *Reservation*,* i. e. an express exception of certain rights the surrender of which would otherwise follow or might be inferred from one's action.

3. *Retention*,† i. e. a lawful possessor's right of withholding a thing due to another, until his claims connected therewith are satisfied.[b] This

(*a*) *Wippermann* de protestationum natura, vi, et effectu. Rinteln, 1799.
(*b*) *Böhmer*, Electa jur. civ. Vol. 2. No. 13. —*Schmid*, Diss. de iis quæ ad exercendum jus retentionis necessaria sunt. Jena, 1785. —*Fasclius*, Vom Retentionsrechte. 2d Ed. 1793.—*Schnorr* de jure retentionis. Leipsic, 1808.—*Truter*, Diss. de jure retentionis. Utrecht, 1814.—*Glück*, Comm. Vol. 15. § 936. 937. Comp. also *Francke*, Erläuterungen einz. Rechtsmaterien. Vol. 1. p. 53.—*Bülow*, Abh. Vol. 2. No. 24.—*Schenck*, Die Lehre von

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ence to such right. In order to be effective, the protest should be made in time, and, as a general rule, either before or at the same time with the act or event to which it relates. Protestation indeed commonly refers to one's own acts, but (as indirectly appears from fr. 60. D. 50. 17.) it takes place also with reference to the acts of others. Wherever *tacitus consensus* might otherwise be inferred, protestation seems to be of especial importance. In regard to it, the two following cases are to be distinguished:

1. The protest must be consistent with the laws, and with the act or event in question; if not so, it will be entirely ineffectual, according to the principle: *protestatio facto vel juri contraria non valet.* If therefore the law attaches absolutely certain consequences to an act, they cannot be averted by a protestation, wherever such act is undertaken intentionally. The same rule applies to acts which are contrary to law. Suppose, for instance, that I should give one a power of attorney to represent me during a certain time in all my legal relations whatsoever; a protest could not in such case relieve me from the obligations which my attorney was fully authorized to assume for me. Or suppose, one man intentionally insults another; his protesting that it was not done *animo injuriandi*, could not of course free him from answering for the consequences of his illegal act.

2. On the other hand, a protestation has effect wherever the law merely *presumes* certain intentions on the part of him who undertakes the act. In such cases, the supposition of the law cannot apply to him who explicitly declares himself against it; according to the rule, that certainty must prevail over mere probability (*verisimile cedit ei quod certum s. manifestum est*). He who, e. g. undertakes acts (such as collecting and paying a testator's debts, &c.) from which it might be inferred that he considered himself as heir, may avert the consequences of such an interpretation of his conduct, by means of a protestation; and he will thus cause himself to be considered merely as a *negotiorum gestor* of the testator, and not as *pro herede gestor;* that is, provided he has actually conducted himself as he professes to have done; for where acts speak for themselves, words are of no value (*ubi facta loquuntur, verba non valent*). In the case, for instance, of a certain prince of northern Germany, mentioned by the late Justice *Waldeck* (Controversen-Entscheidungen, Vol. 1. p. 155 seqq.), this author certainly exhibits the true principles that apply to the subject; and even his conclusions would be unobjectionable, if he had only chosen to state the facts as they actually stood, which would leave not the slightest doubt as to their constituting a *gestio pro herede, in optima forma.* For if a man takes possession, for himself and children and for his children's children, of the estate left by the testator, it cannot be truly said that he is entitled to a protestation against his *pro herede gestio*, nor can he be justly called a mere *negotiorum gestor* of the deceased.

* *Reservation* is only a kind of protestation; and it consists in the retaining of certain rights which might otherwise be regarded as resigned or as not excepted in a transfer which has been made; as e. g. if in selling a thing, I retain for myself the right of reversion, or usufruct, or a mortgage on it; or if I accept from a debtor the payment of the principal, reserving to myself a claim for interest.

† The right of retention is derived either from a voluntary act, i. e. a contract or last will (*jus retentionis conventionale vel testamentarium*); or from a legal permission

right can be exercised only so long as one is in possession of the thing; and the mode of enforcing it is by the *exceptio doli* against the opponent's action for its delivery.[a]

4. *Cautio*, i. e. any security which one gives to another for the performance of an obligation.[b] This is either a *verbal security* (*cautio verbalis*), which is furnished by an assurance under oath (*cautio juratoria*),[c] or by a mere promise, to which however a stipulation (*repromissio*) was requisite according to the Roman law;[d] or else it is a *real security* (*cautio realis*), to which belong especially such as are effected by a guaranty (*satisdatio s. fidejussio*)[e] or by a pledge.[f]

5. The *missio in possessionem s. in bona*, i. e. the assignment by the prætor of the whole property of a debtor or of single objects belonging

dem Retentionsrechte. Jena, 1837.—*Luden* on the same subject. Leipsic. 1839.—*Rosshirt*, D. Civ. R. I. § 71.—*Bucher*, Recht der Forderungen. p. 87. 358.

(*a*) E. g. § 30. J. 2. 1.—fr. 23. § 4. fr. 27. § 5. fr. 48. D. 6. 1.—fr. 14. D. 44. 4.—fr. 18. § 4. D. 13. 6.—fr. 1. pr. D. 20. 6.—fr. 14. § 1. D. 10. 3.—fr. 8. pr. D. 13. 7.—const. 29. C. 5. 12.—const. un. C. 8. 27.

(*b*) Inst. 4. 11.—Dig. 2. 8. and Dig. 46 5.—Cod. 2. 57.

(*c*) § 2. J. 4. 11.—const. 12. pr. C. 12. 19.—Nov. 112. c. 2.

(*d*) Inst. 3. 18. (19.)—fr. 1. D. 46. 5.

(*e*) const. 3. C. 6. 38.—fr. 1. D. 2. 8.

(*f*) fr. 1. § 9. D. 37. 6.—Comp. *Hoffner*, Commentar. Edited by Weber. § 231. 1180.

(*jus ret. legale*). In the first case, the conditions and limits of the right are to be determined from the voluntary act by which it is granted. The *jus retentionis legale*, on the contrary, supposes:

1. A *legal possession of the thing*. Consequently the thing must not have come into the retainer's possession *vi*, *clam*, or *precario*. Moreover the possession must be continuing at the time of the retention; for there can be no reclamation of a thing which has gone out of one's possession, in order to found a right of retention. A man may also retain not only things belonging to others, but also things of his own which he owes to another for a recompense.

2. *A well founded and relative claim* (*debitum fundatum et connexum*). Such a claim is required to be a *debitum liquidum* only in case the demand of the plaintiff is clear. In such a case the possessor, when his set-off is not liquid, must give up the thing, and prosecute the claim for which he considered himself entitled to retention, in a separate suit. Furthermore, every established claim is admissible, if it be only *relative* to the thing withheld (*debitum connexum*), whether it arose out of an *obligatio civilis* or *naturalis*; unless indeed it be altogether rejected by the law (as e. g. gambling debts), or be contrary to good morals. A claim is considered as a *debitum connexum*, and consequently as entitling to retention, only in the following cases: *a*. When necessary or useful expenditures have been employed on the thing, and even with regard to *res dotales* at least the necessary expenses. *b*. When the recompense of a thing is still unpaid: e. g. the landlord has a right to retain the tenant's *invecta* and *illata* until the rent is paid. I may retain the pledge redeemed by me as *negotiorum gestor*, until the pledger refunds me the money which I have advanced for that purpose. I may retain the thing sold until I am paid; and on the other hand, the buyer may retain the price, in case he is threatened with eviction, unless I have given him security. I may retain a thing until the owner has made indemnification for the damage it has done me, as for instance his cattle by coming into my field; or when the service I have rendered is not yet paid for. *c*. When my counter-claim is founded on the same transaction as that from which the plaintiff derives his rights.

The mode of enforcing the right of retention, according to the Roman law, was by the *exceptio doli*; since it was regarded as a *dolus*, to demand a thing on which any payments were still due.

to him, to a creditor for the purpose of securing his claims.[a] In this case the creditor (*immissus*) obtained only the detention of the thing, with which he assumed the right and duty of *custodia*, i. e. of keeping and administering the same;[b] he obtained also through the *immissio* a lien on the thing,[c] and in the case of *missio damni infecti causa*, when granted *ex secundo decreto*, he gained the ownership of the thing itself, provided the debtor was its proprietor,—otherwise he had only *possessio ad usucapionem*.[d]

6. *Arrest*, i. e. a restriction of the personal freedom of the debtor or of the free disposal of his property, by judicial authority, for the purpose of affording security to the creditor. Arrest always presupposes a *justa causa*, i. e. that there is imminent danger that the prosecution of the creditor's right would be either wholly eluded or greatly impeded, if the debtor were allowed the free disposal of his person or property.[e]

Termination of Rights.

A. With the Consent of the Party Entitled.

§ 185. Rights once acquired continue to exist, until some special cause arises to terminate them. Such cause may depend *on the will of the party entitled.* Thus rights are extinguished: 1. By *renunciatio*,*

(*a*) Dig. 36. 4.—ibid. 37. 9.—ibid. 39. 2.—ibid. 42. 4 and 5.—ibid. 43. 4.—Cod. 6. 54.—ibid. 7. 72.—*Donelli* Comm. jur. civ. lib. 23. c. 11. 12.

(*b*) fr. 1. 12. D. 42. 4.—fr. 5. § 5. D. 36. 4.—fr. 3. § ult. fr. 10. § 1. D. 41. 2.—*Savigny*, Recht des Besitzes. 4th Edit. p. 241.

(*c*) fr. 3. pr. § 1. D. 27. 9.—fr. 26. pr. D. 13. 7.—Cod. 8. 22.

(*d*) Such missio ex secundo decreto occurs only in the case of damnum infectum, when the missio ex primo decreto was ineffectual, i. e. when the demanded cautio damni infecti was not given within the time prescribed.

(*e*) Arrest was known to the Roman law only as a means of *executing* a sentence passed against a debtor (*pignoris capio*). In Germany, however, it is employed also as a means of *securing* payment before sentence. See *Glück*, Comm. Vol. 6. § 520.—*Bayer*, Summarische Processe. p. 59 seqq.

* The very nature of a right implies that the entitled party has the liberty of non-exercise, and consequently of renunciation of his right, whether such right be controverted or not; whence the Roman maxim, *Invitus agere vel accusare nemo cogitur*: and this liberty can be excluded only for special reasons. In order to make a valid renunciation, it is necessary that the person entitled should have a general capacity to dispose of his property, which, for instance, is not the case with minors. According to the canon law, individuals are absurdly deprived of the liberty of renouncing privileges granted to the class to which they belong. This view, however, is retained only with respect to the clergy's prerogative of a *forum privilegiatum*; while in other respects the more enlightened views of the civil law have been adopted.

The validity of a renunciation requires, moreover:

1. That there be no obligations attached to the right. If rights are mixed with obligations, renunciation is allowed only as far as the rights extend: thus, e. g. a *socius* may indeed renounce his rights, but he cannot thereby release himself from his obligations to the partnership creditors.

2. He who resigns a right must have a clear knowledge of what it is that he renounces. Hence error with regard to the object will render the renunciation invalid;

which consists in one's resigning a right which previously belonged to him, without transferring it to another.[a] A renunciation supposes that the right actually belongs to him,[b] and that he has a full knowledge of the object of the renunciation.[c] 2. By *alienatio*.[d] This means, in its extended sense, every change which we produce in our legal relations, and hence not only the transfer of a right to another, but also the renunciation of a right, the grant of a servitude or mortgage, or the acceptance of a payment: in a more restricted sense, it denotes the transfer-

(*a*) fr. 41. D. 4. 4.—const. 29. C. 2. 3. "Quilibet jure pro se introducto renunciare potest."—const. 11. C. 4. 1. "Ad jura renunciata non datur regressus."—const. 4. C. 2. 3. —const. 51. C. 1. 3.—*Pfotenhauer*, Diss. utrum et quatenus legibus præsertim prohibitivis renunciari possit? Wittenberg, 1792.

(*b*) fr. 174. § 1. D. 50. 17. "Quod quis, si velit, habere non potest, id repudiare non potest."

(*c*) fr. 19. D. 5. 2.—fr. 8. D. 5. 3.—See *Fritz* in the Archiv Civ. Prax. Vol. 8. p. 389.—*Savigny*, System. Vol. IV. p. 544 seqq.

(*d*) *Hahn* de alienationibus. 2d Ed. Helmstedt, 1745.

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and the same effect will be produced by ignorance of the object at the time the renunciation was made (*renunciatio non refertur ad incogitanda vel incogitata*).

2. The object and the intent of the renunciation must be clearly expressed. Thus, for instance, the contract whence arise the rights which form the object of renunciation, must be plainly stated. Accordingly the renunciation must not be a general one; a general renunciation being valid only when preceded by a special one: at any rate, it must be evident what particular rights it is intended to relinquish. Hence *in praxi* it is justly regarded as necessary, that in the renunciation of exceptions against a contract, those exceptions which the contracting parties intend to renounce should be particularly specified. The resigning of the exception against a general renunciation, which sometimes occurs in deeds for the purpose of covering the defect, is of course nothing but a vain and ineffectual artifice; since the laws require speciality in a renunciation, and an evasion of them in this case can no more be justified than can any other act done *in fraudem legis*.

The effect of a renunciation is, that he who makes it is excluded from the right for ever (*ad jura renunciata non datur regressus*); and therefore he can no longer enforce the right, either by action or by exception. (*Glück*, Comm. Vol. 1. p. 107. 565. Vol. 7. p. 473.) But if a man has resigned a right on one ground, he can claim it on another: thus, e. g. he may lay claim on the ground of a will to the very same right which he renounced only as conferred on him by a contract. Renunciation cannot prejudice third persons; for instance, the renunciation of one of the co-donees cannot prejudice the others with respect to their *jura acquisita*. As renunciations effect an irrecoverable loss of rights, the principle applies to them all, (and with especial force to such as have not been made expressly,) that they must be subjected to the strictest interpretation (*renunciatio strictissime interpretanda est*); that is to say, the interpretation must sustain existing rights as much as possible, by a verbal or so-called literal exposition, which consequently must decide in every case for the narrowest and not for the widest acceptation of an ambiguous expression, in order to obtain the most favourable meaning for him by whom the renunciation is made. The consequences of a default (*contumacia*) should not be explained, though this is often done, as arising from a renunciation; for otherwise, as Martin (Civilprocess. § 117) very truly observes, we must allow that the defaulter has only to declare his dissent, in order to avert from himself all the legal consequences of his default. It remains to be remarked in conclusion that, according to fr. 8. § 1–5. D. 20. 6.—fr. 91. D. 46. 3., in case of the renunciation of a right already acquired, in favour of another, the latter's acceptance of the renunciation is certainly requisite. The last cited passage most clearly requires in every case the acceptance of him against whom the right applied, with respect to *obligationes* and *jura in personam*; but as regards *jura in rem*, according to fr. 1. D. 41. 7.—fr. 64. D. 7. 1.—fr. 9. § 3. D. 13. 7.—const. 7. C. 8. 26. a mere surrender must be considered as sufficient.

ring or granting of a right;[a] and in its strictest sense, the transfer of the ownership of a thing to another.[b] As a general rule, every one who actually owns a thing is capable of making such alienation, unless it be prohibited for special reasons. Such restriction of alienation may be founded on a legal or judicial precept,[c] or on a testamentary disposition, or on a contract. If then a legal or judicial prohibition be violated, the alienation is entirely void; and he in whose favour the prohibition was made, may consequently bring a real action against the third party.[d] The non-observance of a testamentary prohibition of alienation, gives the right sometimes to a real action against the third party, and sometimes to a personal action for damages against the alienator; according as the testator prohibited, in favour of a third person, the alienation of a thing belonging to himself or to an heir or legatee.[e] A prohibition of alienation founded on agreement, usually produces, when infringed or violated, only a personal action for damages against the alienator, unless it has been secured against such a case of violation by a *pactum reservati dominii* or *reservatæ hypothecæ*.[f]

B. Against the Will of the Party Entitled.

§ 186. Rights may terminate from many causes *contrary to the will of the party entitled.* The principal causes are the following: 1. Rights which are dependent on a status, cease when the status ceases. 2. Real rights are extinguished, when their object perishes. 3. Claims, when they are discharged in any way. 4. Furthermore, real rights as well as personal claims terminate: *a.* when he who granted the right to another had himself from the first only a temporary or revocable right in the thing, and this becomes extinct;[g] or when he who conceded a right to another is entitled, for special subsequent causes, to revoke it, and he does so after the causes have actually occurred;[h] *b.* when the resolutory condition has been actually accomplished, or the term has

(*a*) const. 7. C. 4. 51. To this case the rule applies: "Nemo plus juris in alterum transferre potest quam ipse habet." fr. 54. D. 50. 17.

(*b*) fr. 67. pr. D. 50. 16.—const. 1. C. 5. 23.

(*c*) pr. § 2. J. 2. 8.—const. un. § 15. C. 5. 13. —const. 12. 13. C. 5. 71.—fr. 1. pr. fr. 10. pr. D. 27. 10.—*Schweppe*, R. Priv. R. Vol. 2. § 226.

(*d*) fr. 5. § 15. D. 27. 9.—const. 16. C. 5. 37. —const. 15. C. 5. 71.—fr. 13. § 3. D. 23. 5.—const. 30. in fin. C. 5. 12.—fr. 12. D. 41. 3.—fr. 6. D. 45. 1.

(*e*) § 5. J. 3. 28.—fr. 88. § 14. D. 31.—fr. 3. § 3. D. 36. 1.—const. 1. 2. 3. § 2. 3. C. 6. 43.

(*f*) fr. 75. D. 18. 1.—fr. 21. § 5. D. 19. 1.—fr. 135. § 3. D. 45. 1.—const. 3. C. 4. 6.—See in general: *H. Carrard*, Diss. de pacto de non alienando. Tubingen, 1789.—*Lauk* in Linde's Zeitschrift. Vol. 5. p. 1.—*Puchta*, Von den Klagen. § 78. 79. Dr. Rosshirt adds that this view of Mackeldey disagrees with that of other jurists, and indeed with his own statement in the sentence immediately preceding. The rights which one enjoys over his own property are the same, whether he makes an alienation *mortis causa* or *inter vivos*; and consequently there is no reason in the nature of contracts to account for a distinction such as is here attempted to be made between them.

(*g*) According to the rule, "Resoluto jure concedentis, resolvitur jus concessum."

(*h*) E. g. const. 8. 10. C. 8. 56.—Comp. *Savigny*, System. Vol. 3d. § 120.

come to an end for which the right was conceded;[a] *c.* when one is deprived of his right for the abuse of it or for any misdemeanor;[b] and lastly, *d.* by lapse of the time of prescription.

Time in relation to Rights.

§ 187. The acquisition, enforcement, and loss of rights is often made by the laws to depend on a certain time (*tempus*); so that they can be exercised and enforced only during such time or only after its expiration. The Roman law makes a distinction: 1. With respect to the *time itself*, between *tempus continuum* and *tempus utile*.[c] These expressions relate partly to the *beginning*, and partly to the *extent* or *duration* of a term. In regard to the beginning, *tempus continuum* signifies a term which begins to run from a certain event, even though he for whom it runs has no knowledge of the event;[d] *tempus utile*, on the contrary, denotes a term which begins to run only when he for whom it runs has obtained a knowledge of the event.[e] In regard to duration, *tempus continuum* signifies a term in which, when it has once begun to run, all the days are reckoned as they follow one another in the calendar; while *tempus utile* signifies one in which those days are not reckoned on which one has no *experiundi potestas*, i. e. on which one cannot prosecute his rights before court.[f] 2. With respect to the *expiration* or completion of a term, there is a distinction between *computatio temporis naturalis* and *civilis*. In the former, the reckoning is made from moment to moment, so that a term commencing from a certain event is not held to be completed until the last moment of it has passed by.[g] In the latter, on the contrary, the reckoning is made only from day to day, and to this applies the rule: *dies novissimus cœptus pro completo habetur*. *Dies novissimus*, *postremus*, or *supremus*, denotes in the Roman law the last calendar day of a term, e. g. in a term of a year which begins on the first day of January, the 31st of December of the same year is the *dies novissimus*; and as soon as this has begun, that is to say, immediately after midnight of the 30th, the term is *civiliter* completed.[h]

(*a*) E. g. fr. 4. pr. D. 8. 1.—fr. 4. D. 7. 1.—fr. 6. pr. D. 20. 6.—fr. 44. § 1. 2. D. 44. 7.

(*b*) E. g. const. 3. C. 11. 42.—cap. 24. X. 5. 33.

(*c*) *Haubold* de temporis continui et utilis computatione. Leipsic, 1791. and in his Opusc. edited by Wenck. Vol. 1. p. 397.

(*d*) fr. 8. D. 3. 2.—fr. 31. § 1. D. 41. 3.—fr. 55. D. 21. 1. const. 8. C. 2. 21.—const. 5. C. 9. 9.

(*e*) fr. 8. D. 3. 2.—fr. 6. D. 3. 6.—const. 2. C. 6. 9.—const. 19. C. 6. 30.

(*f*) fr. 1. D. 44. 3.—fr. 2. D. 38. 15.

(*g*) E. g. fr. 3. § 3. D. 4. 4.—fr. 4. D. 23. 2 const. 3. C. 5. 60.—§ 8. J. 2. 16.—fr. 6. D. 44. 7.

(*h*) fr. 8. D. 2. 12.—E. g. fr. 6. 7. D. 41. 3.—fr. 15. pr. D. 44. 3. compared with fr. 6. D. 44. 7. also fr. 5. D. 28. 1.—fr. 134. D. 50. 16. And concerning the whole doctrine of computatio civilis, see *Rücker*, Diss. de naturali et civili computatione temporis. Leyden, 1749.—*Erb* in Hugo's Civ. Mag. Vol. 5. No. 8.—*Schweppe*, Jur. Mag. P. 1. No. 9.—*Koch*, Ueber die Mündigkeit zum Testiren, Civil-Zeit-Computation und Schalttag. Giessen, 1796.—Krit. Archiv der neuesten Literatur by *Danz*, *Gmelin* and *Tafinger*. Vol. 1. p.

CHAPTER II.

RIGHTS AND PRIVILEGES.[a]

1. *Jus Commune and Singulare in general.*[*]

§ 188. THE positive laws either contain and confirm the common and natural rule of right (*regula juris s. ratio juris*), or they establish for special reasons something that differs from this common rule. In the first case, they contain a *jus commune;* in the second, a *jus singulare s. exorbitans.*[b] This last is either a *jus singulare favorabile* or *odiosum;* according as it extends or restricts, in opposition to the common rule, the rights of those for whom its provisions are intended. The *jus singulare favorabile* is sometimes called in the Roman law, *privilegium:* and this is either a *beneficium personæ*, when confined to the person on whom it is conferred, in which case its exercise cannot be extended to his heirs and sureties;[c] or else a *beneficium causæ*, when granted with regard to the obligation itself, so that it may be made use of not only by the party immediately and originally entitled to it, but also by his heirs,

577. 756. Vol. 2. p. 193.—*Glück*, Comm. Vol. 3. § 269.—*Schrader*, Civ. Abh. No. 3.—*Unterholzner*, Verjährung. P. 1. p. 296. 302.—*Löhr* in the Archiv Civ. Prax. Vol. 11. p. 411.—*Rosshirt*, Grundsätze des Strafrechts. p. 395 seqq.—*Reinfelder*, Der annus civilis des Röm. Rechts. Stuttgart, 1829.—*Savigny*, System. Vol. 4. p. 346.

(*a*) *Glück*, Einl. in das Studium des Röm. Privatrechts. § 20–28.—*Hufeland*, Ueber den eigenthümlichen Geist des Röm. Rechts. Vol. 1. No. 3.—*Dirksen*, Ueber die Behörden, welche im Röm. Reiche Privilegien ertheilten; in his Civ. Abhandl. Vol. 1. p. 242.

(*b*) fr. 14–16. D. 1. 3.—fr. 141. pr. D. 50. 17.

(*c*) fr. 68. 196. D. 50. 17. For instance, fr. 24. 25. D. 42. 1.—fr. 7. pr. D. 44. 1.—const. 13. C. 10. 47.—*Mühlenbruch*, Cession. § 56.

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* The meaning of a *jus singulare* might have been more accurately defined in the text. *Jus singulare* is every irregularity, exception, or peculiarity which runs counter to the *jus commune*, or common, natural rule of right. Such a *jus singulare* may relate to individuals, to an entire class of persons, or even to the whole community; since its distinguishing characteristic is simply that it establishes something abnormal: thus, a *jus singulare* is, for instance, the allowing of an individual, contrary to the common and natural rule, to make a will for another; or the excepting of certain classes of persons from the common rule, "ignorantia juris nocet;" or the imposing of restrictions with regard to the general rate of interest. Even this last case, although referring to the whole community, belongs to the *jura singularia*, inasmuch as it is opposed to the common and natural rules, "pacta legem faciunt inter partes," and "pacta quælibet servanda sunt." It is in consequence of their anomalous nature, that *jura singularia* are not permitted to be extended by way of analogy: since on the one hand, every thing that disagrees with the rule must be treated *stricte;* and on the other hand, the extension of peculiarities would only tend to deform the law. Finally, as has already been intimated, a *jus singulare*, like a *jus commune*, may be with respect to its extent either general or special; thus e. g. the *beneficia legis* are sometimes *generalia* (as the beneficium inventarii, ordinis, divisionis), and sometimes *specialia* (as the beneficium Scti Macedoniani, Velleiani, &c.).

sureties, and successors in the right (*cessionarii*).[a] Both one and the other, however, come into consideration only when the privileged persons themselves appeal to it.[b]

2. *Privilege in particular.*

a. Definition and Kinds of Privilege.

§ 189. Privilege (*privilegium*), in its *general sense*, denotes every peculiar right or favour granted by the law, contrary to the common rule. Such privilege may either be conferred by a general law (*lex generalis*) upon all those citizens who are in the condition contemplated by the law, in which case it is synonymous with *beneficium juris* or *jus singulare favorabile*;[c] or else it is given by a special act of the legislature (*lex personalis*) only to some individual person or thing, in which case it is a privilege in the *stricter sense*.[d] But as *beneficium juris* is often called *privilegium* in the Roman law,[e] so too on the other hand a *privilegium* in the stricter sense is sometimes denoted by the term *beneficium*.[f]

Privilege in the *stricter sense* is of the following kinds: 1. With respect to the *subject* to which it belongs, it is either a *privilegium personæ*, as when it pertains to a physical person or community; or a *privilegium rei s. prædii*, as when it is conferred on a piece of land.[g] 2. With respect to its *object*, a privilege consists in giving to the privileged person an especial advantage over others (*priv. affirmativum*),[h] or in exempting him from a duty which is incumbent upon others (*immunitas*, *vacatio*, now termed *priv. negativum*). 3. With respect to its *title*, it is either a so-called *priv. gratuitum*, when the granting of it rests solely on the favour and liberality of the ruler; or a so-called *priv. onerosum*, when the privileged party pays or performs something in return for it, or when it is granted as a recompense for services previously rendered.[i]

(*a*) fr. 68. 196. D. 50. 17.—fr. 7. § 1. fr. 19. D. 4. 41.—E. g. fr. 6. D. 4. 1.—fr. 18. § 5. fr. 24. pr. D. 4. 4.—fr. 14. § 2. D. 4. 2.—const. un. C. 2. 34.

(*b*) fr. 69. D. 50. 17. "Invito beneficium non datur." fr. 156. ibid.

(*c*) It is in this sense that we speak of the privileges of a creditor in regard to his rights of pawn and mortgage; of the privileges of the fiscus, minors, soldiers, and women; of the privileges of the dos, &c. fr. 40. 42. 44. § 1. D. 26. 7.—fr. 74. D. 23. 3.—Cod. 7. 73. 74.—const. 12. C. 8. 18.—Nov. 97. c. 2. 3.—Nov. 109. c. 1.

(*d*) Compare fr. 1. § 1. 2. D. 1. 4.—§ 6. J. 1. 2.

(*e*) fr. 196. D. 50. 17. and the passages cited above, note *c*.

(*f*) See among others fr. 3. D. 1. 4.

(*g*) fr. 1. § 41–43. D. 43. 20. It is wrong to reckon among the latter the privilegia causæ; for they are not privileges in the strict meaning of the term, but jura singularia (p. 182 note *a*). Compare *Höpfner*, Comm. § 49. and *Mühlenbruch*, Cession. 2d Edition. p. 283 seqq.

(*h*) A particular kind of these are the *monopolia*, by virtue of which one is entitled to do alone and *exclusively* what might else be done likewise by others.

(*i*) It is incorrect to oppose privilegia conventionalia to privilegia gratuita, as the grant-

b. Its Legal Nature.

§ 190. The legal nature and effects of a privilege are in the first place to be determined from the contents of the act by which it is granted. The following principles apply generally to every privilege: 1. The privileged party may exercise it to its full extent, and nobody is allowed to disturb him in so doing;[a] hence he has a right to prohibit any other person, who is not in the enjoyment of a similar privilege, from assuming the same right.[b] 2. A privilege granted to a physical person can be exercised only by the party to whom it is given;[c] one conferred on a corporation may be exercised, according to its nature, either by all the individual members of the community (e. g. exemption from taxes), or only in the name of the community by its proper officers (e. g. jurisdiction); a privilege attached to a piece of land may be exercised by any possessor of the land.[d] 3. Every privilege is inseparable from its subject. Hence the privileged party cannot alienate and transfer the *privilege itself* to another;[e] although, as a general rule, he may surrender the *exercise* of his right to another, either as a free gift or for a recompense, provided it is consistent with the special nature and quality of the privilege: accordingly the exercise of negative privileges is incapable of surrender, and the same may be said of those affirmative privileges the exercise of which is limited to the privileged person.[f]

c. Its Termination.

§ 191. A privilege becomes extinct: 1. *According to its nature*, at the expiration of the time for which it was granted;[g] or, when conferred without limitation as to time, with the extinction of the entitled subject. Hence a privilege granted to a physical person is extinguished at his death;[h] one given to a community lasts as long as the community itself continues in existence;[i] and that which is attached to a thing expires when the thing itself is destroyed. But if the thing be restored again, the privilege also revives.[k] 2. When the ruler or legislature *resumes it*, which, however, as a general rule, can be done only where it was granted subject to recall;[l] and in other cases only where the public weal requires its resumption, and then the privileged party is entitled to a reasonable indemnification for the loss of his right. 3. When

ing and acceptance of a privilege always rests on an agreement, whether it be purchased or conferred by gift.

(*a*) fr. 3. D. 1. 4.—const. 2. C. 1. 14.

(*b*) In case another enjoys a like privilege, the rule applies: "Privilegiatus adversus eque privilegiatum jure suo (scil. prohibitivo) non utitur."

(*c*) fr. 1. § 43. D. 43. 20.—fr. 1. § 2. D. 1. 4.

(*d*) fr. 1. § 43. D. 43. 20.

(*e*) But wherever it has the character of a privilegium rei, it is transmitted by the alienation of the thing itself, as its appurtenance, to the successor.

(*f*) *Mühlenbruch*, Cession. p. 281 seqq. p. 536 seqq.

(*g*) const. 2. C. 1. 23.

(*h*) fr. 1. § 43. D. 43. 20.—const. 13. C. 10. 47.

(*i*) fr. 4. § 3. D. 50. 15.

(*k*) arg. fr. 20. § 2. D. 8. 2.

(*l*) arg. const. 7. C. 1. 19.—cap. 1. de constitutionibus in 6to.—cap. 16. 17. de reg. jur.

the privileged party *abuses it*, and consequences ensue which are particularly injurious to the state; in which case he may be deprived of his privilege by a judgment of the court.[a] 4. When the party either expressly or tacitly *renounces it*.[b] It is regarded by the canon law as a tacit renunciation, when the privileged party has not exercised it for a long time, although he had opportunity and occasion so to do. It is now customary to term this a loss of privilege by *prescription*; and for the establishment of such prescription the canon law, as a general rule, requires thirty years; and in the case of church privileges, forty years.[c] It seems more correct, however, to say that privileges are prescribed against, in the same manner and in the same time, as other rights and liberties; which is especially done by the adversary's usucapio of the liberty or right opposed to the privilege.[d]

3. *Concurrence and Collision of Rights and Privileges.* (e)

§ 192. A *concurrence* of several rights takes place, when the rights of different persons apply to the same object, but none of the parties entitled possesses an exclusive right. Here each of them may exercise his right to the full extent, even though it should diminish the profits of the others. A *collision* of rights, on the contrary, takes place when the rights of several persons come in contact in such a manner that only one of them can be fully exercised; in which case the question arises, which right shall prevail over the rest. This is to be determined according to the following rules: 1. The more special is to be preferred to the general right; hence a *privilegium* has the preference over a *jus singulare*, and the latter over a *jus commune*.[f] 2. If the rights are in principle equally general or equally special, then that which is most favoured by the laws has the preference.[g] 3. In the case of equal rights, if the laws have not expressly determined which shall have the priority, the following distinctions are then to be observed: *a*. Either the rights come into *direct* collision, i. e. the parties entitled to such

in 6to. It makes no difference whether it be a priv. gratuitum or onerosum (§ 190).—*Glück*, Comm. Vol. 2. § 107. 108.

(*a*) const. 3. C. 11. 43.—cap. 43. X. 1. 3.

(*b*) fr. 41. D. 4. 4.—const. 29. C. 2. 3.—*Binder*, Diss. de renunciatione privilegiorum. Gottingen, 1791.

(*c*) cap. 6. 15. X. 5. 33. For according to the Roman law, negative privileges do not terminate by non-user.—const. 2. C. 10. 43. and as to affirmative privileges, only the privilegium nundinarum is subject to the provision that it shall become extinct in ten years.

(*d*) For the various opinions on the subject, see *Glück*, Comm. Vol. 2. § 110. and his Handb. zu Günther § 25.—*Thibaut*, Besitz und Verjährung. § 62.—*Dabelow*, Verjährung. Vol. 2. p. 284. 338.—*Hufeland*, Geist des R. R. Vol. 1. p. 274.—*Gottschalk*, Disc. for Vol. 1. c. 17.—*Wening*, Civ. R. § 33.—*Unterholzner*, Verjährung. P. 2. § 161.

(*e*) *Wolters* de jure singulari, de privilegiis, eorumque collisione et prelatione inter se. Gottingen, 1809.—*Thibaut*, Versuche. Vol. 2. No. 14.—*Hufeland*, Geist. des R. R. Vol. 2. No. 7.

(*f*) fr. 80. D. 50. 17. "In toto jure generi per speciem derogatur et illud potissimum habetur, quod ad speciem directum est."—*Stahl*, Ueber die Collision und den Vorzug des Besondern vor dem Allgemeinen im Rechte. Wurtzburg, 1826.

(*g*) E. g. fr. 3. § 2. D. 14. 6.—fr. 11. § 7. fr. 12. pr. D. 4. 4. A legal preference of that kind is in case of equal privileges conceded to priority. const. 7. C. 1. 19.—const. 12. § 1. C. 8. 18.—Nov. 91. c. 1. The same applies to equal rights of pawn and mortgage, fr. 12. D.

rights hold them *one against the other*, in which case he who desires by the exercise of his right to avoid a positive *loss* of property, will have the preference over him who merely wishes to maintain a *profit* already made;[a] but when both have equal reason to dread a positive loss, then he has the preference who has obtained something from the other without becoming richer thereby;[b] in all other cases, the two rights countervail each other, so that neither of them can be carried into effect.[c] *b.* Or else the collision of rights is *indirect*, i. e. they apply in common to a *third object*, to which each of the entitled parties has an exclusive right. If then one of them already has possession of the object, his right has the preference.[d] If, on the contrary, neither has as yet ob-

20. 4., but not to other real rights nor to jura singularia. Contra: *Hufeland*, l. c. Vol. 2. No. 7.

(*a*) arg. fr. 14. D. 12. 6. "Natura æquum est, neminem cum alterius detrimento fieri locupletiorem." E. g. fr. 11. § 6. fr. 34. pr. fr. 27. § 1. D. 4. 4.—*Hufeland* (l. c. p. 39.) entertains a somewhat different opinion.

(*b*) fr. 11. § 6. fr. 34. pr. D. 4. 4. and also fr. 126. § 2. fr. 128. pr. D. 50. 17. "In pari causa possessor potior haberi debet."

(*c*) E. g. fr. 36. D. 4. 3. (Marcianus says) "Si duo dolo malo fecerint, *invicem de dolo non agent.*"—fr. 39. D. 24. 3. (Papinianus) "Vire atque uxore mores invicem accusantibus, causam repudii dedisse utrumque, pronunciatum est. Id ita accipi debet, ut ea lege, quam ambo contemserunt, *neuter vindicetur: paria enim delicta mutua pensatione dissolvuntur.*"—fr. 17. D. 18. 6. (Pomponius) "Illud sciendum est, cum moram emtor adhibere cœpit, jam non culpam, sed dolum (malum) tantum præstandam a venditore. Quod si per venditorem et emtorem mora fuerit, Labeo quidem scribit, emtori potius nocere, quam venditori moram adhibitam; sed videndum est, ne posterior mora damnosa ei sit. Quid enim, si interpellavero venditorem, et non dederit id quod emeram; deinde posteriore offerente illo ego non acceperim? Sane hoc casu *nocere mihi deberet.* Sed si per emtorem mora fuisset, deinde, cum omnia in integro essent, venditor moram adhibuerit, cum posset se exsolvere; æquum est, posteriorem moram venditori nocere."—fr. 34. § 3. D. 18. 1. (Paulus) "Item, si et emtor, et venditor scit, furtivum esse quod venit, *a neutra parte obligatio contrahitur.* Si emtor solus scit, non obligabitur venditor: nec tamen ex vendito quidquam consequitur, nisi ultro, quod convenerit, præstet. Quod si venditor scit, emtor ignoravit, utrinque obligatio contrahitur. Et ita Pomponius quoque scribit."—fr. 57. pr. D. ibid. (Paulus) "Domum emi, cum eam et ego, et venditor combustam ignoraremus. Nerva, Sabinus, Cassius, *nihil venisse*, quámvis area maneat: *pecuniamque solutam condici posse, aiunt.* Sed si pars domus maneret, Neratius ait, in hac quæstione multum interesse quanta pars domus incendio consumtæ permaneat: ut, si quidem amplior domus pars exusta est, non compellatur emtor perficere emtionem: sed etiam, quod forte solutum ab eo est, repetet, sin vero vel dimidia pars, vel minor quam dimidia exusta fuerit: tunc coarctandus est emtor venditionem adimplere, æstimatione viri boni arbitratu habita, ut, quod ex pretio propter incendium decrescere fuerit inventum, ab hujus præstatione liberetur."—fr. 57. § 3. D. 18. 1. (Paulus) "*Quod si uterque sciebat*, et emtor et venditor, domum esse exustam totam, vel ex parte, nihil actum fuisse: *dolo inter utramque partem compensando*; et judicio, quod ex bona fide descendit, dolo ex utraque parte veniente, stare non concedente."

(*d*) fr. 128. pr. D. 50. 17. See above, note *b.* —fr. 6. § 7. D. 42. 8. (Ulpianus) "Sciendum, Julianum scribere, eoque jure nos uti, *ut qui debitam pecuniam recepit, antequam bona debitoris possideantur quamvis sciens prudensque solvendo non esse recipiat, non timere hoc Edictum:* sibi enim vigilavit. Qui vero post bona possessa debitum suum recepit, hunc in portionem vocandum, exæquandumque ceteris creditoribus: neque enim debuit præripere ceteris post bona possessa cum jam par conditio omnium creditorum facta esset."—fr. 24. D. 42. 8. (Scævola) "Pupillus patri heres extitit et uni creditorum solvit: mox abstinuit hereditate paterna; bona patris veneunt; an id, quod accepit creditor, revocandum sit, ne melioris conditionis sit, quam ceteri creditores? an distinguimus, per gratificationem acceperit, an non? ut si per gratificationem tutorum, revocetur ad eandem portionem, quam ceteri creditores fuerint laturi; sin vero juste exegerit, ceteri creditores neglexerint exactionem, interea res deterior facta sit, vel mortalitate, vel subductis rebus mobilibus, vel rebus soli ad irritum perductis; id, quod acceperit creditor, *revocari nullo pacto potest:* quoniam alii creditores sum negligentiæ expensum ferre debeant. Quid ergo, si cum in eo essent, ut bona debitoris mei venirent, solverit mihi pecuniam: an actione revocari ea possit a me? an distinguendum est, is obtulerit mihi, an ego illi extorserim invito? et si extorserim invito, revocetur? sed vigilavi, meliorem meam conditionem feci; jus civile vigilantibus scriptum est: ideo (quoque) non revocatur

tained possession, then the object, if divisible, will be divided proportionally between the parties equally entitled;[a] and if indivisible, the two rights will generally destroy each other; but in a case where, according to the circumstances or to the nature of the rights, one of them *must* be exercised, if the laws themselves[b] furnish no means of decision, it must be determined by lot.[c]

id quod percepi."—fr. 32. D. 3. 3. (Paulus) "Pluribus procuratoribus in solidum simul datis, *occupantis melior conditio erit:* ut posterior non sit in eo, quod prior petit procurator."—const. 15. C. 3. 32. "Quotiens duobus in solidum prædium jure distrahitur: manifesti juris est, eum, *cui priori traditum est, in detinendo dominio esse potiorem.* Si igitur antecedente tempore te possessionem emisse, ac pretium exsolvisse apud Præsidem provinciæ probaveris: obtentu non datorum instrumentorum expelli te ‖a‖ possessione non patietur. Erit sane in arbitrio tuo, pretium, quod dedisti, eum usuris recipere: ita tamen, ut perceptorum fructuum ac sumptuum ratio habeatur: cum, et si ex causa donationis utrique dominium rei vindicetis; *eum, cui priori possessio* soli tradita est, haberi potiorem conveniat."

(*a*) As in the case of a legacy to several jointly fr. 33. D. 30. (Paulus) "Si pluribus eadem res legata fuerit: si quidem conjunctim, etiam si alter vindicet, alter ex testamento aget, *non plus quam partem habebit* is qui ex testamento aget. Quod si separatim, si quidem evidentissime apparuerit, ademtione a priore legatorio facta, ad secundum legatum testatorem convolasse, solum posteriorem ad legatum pervenire placet; sin autem hoc minime apparere potest, *pro virili portione ad legatum omnes venire:* scilicet nisi ipse testator ex scriptura manifestissimus est, utrumque eorum solidum accipere voluisse: *tunc enim uni pretium, alii ipsa res adsignatur,* electione rei vel pretii servanda ei, qui prior de legato sive fideicommisso litem contestatus est: ita tamen, ut non habeat licentiam, altero electo, ad alterum transire."—Also in the case of bankruptcy. const. 6. C. 7. 72. "Pro debito creditores addici sibi bona sui debitoris non jure postulant. Unde, si quidem debitoris tui ceteri creditores pignori res acceperunt potiores eos, quam te chirographarium creditorem haberi, non ambigitur. Quod si specialiter vel generaliter nemini probentur obligatæ, ac sine successore communis debitor vel ejus heres decessit: non dominii rerum vindicatione, sed possessione bonorum, itemque venditione æquali portione pro rata debiti quantitate omnibus creditoribus consuli potest."

(*b*) fr. 38. pr. § 1. D. 42. 1. (Paulus) "Inter pares numero judices si dissonæ sententiæ proferantur in ‖de‖ liberalibus quidem causis (secundum quod D. Pio constitutum est) *pro libertate statutum obtinet: in aliis autem causis pro reo:* quod et in judiciis publicis obtinere oportet. § 1. Si diversis summis condemnent judices, minimam spectandam esse, Julianus scribit."—fr. 7. § 19. D. 2. 14. (Ulpianus) "Hodie tamen, ita demum pactio hujusmodi creditoribus obest, si convenerint in unum, et communi consensu declaraverint, *quota parte debiti contenti sint:* si vero dissentiunt, tunc prætoris partes necessariæ sunt, *qui decreto suo sequetur majoris partis voluntatem.*" — fr. 8. D. ibid. (Papinianus) "*Majorem esse partem, pro modo debiti,* non pro numero personarum placuit. Quod si æquales sint in cumulo debiti, tunc plurium numerus creditorum præferendus est; in numero autem pari creditorum auctoritatem ejus sequetur Prætor, qui dignitate inter eos præcellit; sin autem omnia undique in unam æqualitatem concurrant, humanior sententia a Prætore eligenda est: hoc enim ex Divi Marci rescripto colligi potest."—fr. 9. D. ibid. (Paulus) "*Si plures sint, qui eandem actionem habent; unius loco habentur.* Utputa, plures sunt rei stipulandi, vel plures argentarii quorum nomina simul facta sunt: unius loco numerabuntur, quia unum debitum est. Et cum tutores pupilli creditoris plures convenissent, unius loco numerantur: quia unius pupilli nomine convenerant. Nec non et unus tutor plurium pupillorum nomine unum debitum prætendentium, si convenerit, placuit unius loco esse: nam difficile est, ut unus homo duorum vicem sustineat: nam nec is qui plures actiones habet adversus eum qui unam actionem habet, plurium personarum loco accipitur."—fr. 58. § 1. D. 17. 1.—const. 8. C. 7. 71.

(*c*) fr. 13. D. 5. 1. (Gaius) "In tribus istis judiciis (familiæ herciscundæ, communi dividundo, et finium regundorum) quæritur. quis actor intelligatur? quia par causa omnium videtur. Sed magis placuit, eum videri actorem, qui ad judicium provocasset."—fr. 14. D. ibid. (Ulpianus) "Sed cum ambo ad judicium provocant, sorte res discerni solet."—fr. 5. D. 10. 2. (Gaius) "Si quæ sunt cautiones hereditariæ, eas judex curare debet ut apud eum maneant, qui majore ex parte heres sit: ceteri descriptum et recognitum faciant, cautione interposita: ut, cum res exegerit, ipsæ exhibeantur. Si omnes iisdem ex partibus heredes sint, nec inter eos conveniat, apud quem potius esse debeant, *sortiri eos oportet,* aut ex consensu vel suffragio eligendus est amicus, apud quem deponantur, vel in æde sacra deponi debent."—const. 3. pr. C. 6. 43. and § 23. J. 2. 20.—*Neundorff,* Ueber den Gebrauch des Looses; in his Vermischte Abh. Ulm, 1805. No. 2. *Runde,* Comm. de privilegiis personalibus, hypothecis tacitis, et privilegiis hypothecarum. Gottingen, 1794.

CHAPTER III.

PROSECUTION OF RIGHTS.[a]

I. Actions.*

A. Definition.

§ 193. *Action* (*actio*)[b] is the name given to that means which a man employs to cause another to be *sentenced* by the judge to do, to leave undone, or to give whatever he is entitled to demand of him.[c] Every

(*a*) The doctrine of the prosecution of rights belongs to the private law no further than as it relates to the application of the principles of law to the proceedings before the judge. For all that concerns the organization of the courts and the modes of proceeding, belongs to the public law. This distinction is important also for this reason, that while the forms of proceeding established by the public law may be changed, the truths and principles of the private law remain no less applicable, or are at most but slightly altered. A very remarkable instance of this kind is presented by the Corpus Juris itself; for the Pandects were chiefly extracted from writings published at a time when an entirely different system of proceeding prevailed, viz. the proceedings before the prætor, which had ceased to be followed while the private law remained essentially the same. In modern times a separate science has been constructed out of that part of the doctrine of the prosecution of rights which belongs to the public law. This is called the science of *civil proceedings*; and its object is to treat of the organization of civil courts and the manner of proceeding in civil suits.

(*b*) Respecting the *ancient* Roman law of actions, see: *Gaius*, Inst. lib. 4.—*Dupont*, Disquis. in comm. IV. Inst. Gaii. Leyden, 1822.—*Burnouf* de re judicata et de rei judiciariæ apud Romanos disciplina. Paris, 1824. —*Van Hasselt* de legis actionibus. Groningen, 1825.—*Tigerström* de judicibus apud Romanos. Berlin, 1826.—*Heffter* in libro observatt. ad Gaii Inst. comm. IV. Berlin, 1827. *Stahl*, Ueber das ältere Römische Actionenrecht. Munich, 1827.—*Zimmern*, R. G. Vol. 3. —*Schneider*, de Centumviralis Judicii apud Romanos origine. Rostock, 1835. *Collmann* de Romanorum Judicio Recuperatorio. Berlin, 1835.—*Hollweg*, in the Z. f. gesch. R. W. Vol. 5. No. 11.—*Niebuhr*, R. G. Vol. 1. p. 472. Vol. 3. p. 648.—*Savigny*, System. Vol. 5.—*Bachofen* de Roman. judiciis civilibus, de legis actionibus, de formulis, &c. Gottingen, 1840.—On the *later* law of actions see: Inst. IV. 6.—Dig. 44. 7.—Cod. 4. 10.—*Donelli* Comm. jur. civ. Lib. 19. c. 1. 2. Lib. 21. c. 1. 2. and his Comment. ad tit. Inst. de actionibus. Antwerp, 1581. New edition. Leyden, 1630.—*Bachovii* tract. de actionibus. Frankfort, 1623.—*Böhmer*, Doctrina de actionibus, &c. Frankfort, 1787.—*J. L. Schmidt*, Praktisches Lehrbuch von gerichtlichen Klagen und Einreden. 5th Edition. Jena, 1798. 6th and 7th Editions with additions and corrections by A. D. Weber. Jena, 1803. 1813. 8th Edition enlarged by C. Martin. Jena, 1823.—*E. G. Schmidt*, Commentar, on the last mentioned work of his father. Leipsic, 1792-94. 2d Edition by Faselius. Leipsic, 1800-3. 5 Vols.—*Mössler*, System der Lehre von gerichtlichen Klagen und Einreden. Erfurt, 1798-1805. in 5 Vols. — *W. H. Puchta*, Ueber die gerichtlichen Klagen. Giessen, 1833.

(*c*) pr. J. 4. 6. "Actio nihil aliud est, quam

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* According to the judicial system of the Romans, the entire administration of justice was conferred on the prætors. The principal part of their duty was to act as civil judges; the management of criminal causes, and of matters relating to guardianship and fideicommissa, was intrusted to several prætors who had nothing to do with civil suits. The extent of the civil jurisdiction of the prætors is briefly expressed in these three words: "Do, DICO, ADDICO." *Do* denotes that the prætor granted actions, exceptions, and judices (*prætor* DABAT *actionem, exceptiones, judices*); *dico*, that he pronounced sentence (DICEBAT *jus*); *addico*, that he adjudged the controverted property, or the goods of the debtor, &c. to the plaintiff (ADDICEBAT *bona vel damna*). Under the prætor, as its head, was placed the department of justice called *consilium*, whose members were composed of, 1. the *decemviri litibus judicandis*, who had to conduct the centumviral court; 2. the centumviri; 3. the assessores learned in the law. The subordinate

action therefore in its nature presupposes a certain *plaintiff* (*actor*) and a certain *defendant* (*reus*); and in one and the same legal relation, as a general rule, one can be only plaintiff, and the other only defendant; although there are certain cases in which, by way of exception, each of the parties may be either plaintiff or defendant. In cases such as these, the actions are termed by the Roman law *judicia duplicia*.[a]

jus persequendi judicio, quod sibi debetur." fr. 1. D. 44. 1.—fr. 8. § 1. D. 50. 16. "Actionis verbo non continetur exceptio." fr. 2. pr. D. 44. 1.—fr. 52. D. 41. 1.—*A. D. Weber*, Beiträge zu den Klagen und Einreden. P. 1. No. 1.—*Hasse* in the Rhein. Mus. Vol. 6. Nos. 1 and 6. The statement in fr. 1. D. 44. 1. "Agere etiam is videtur, qui exceptione utitur: nam reus in exceptione actor est," is not inconsistent with the rule, "Actionis verbo non continetur exceptio."

(*a*) E. g. fr. 2. § 3. D. 10. 2.—§ 7. J. 4. 15. —fr. 10. D. 10. 1. (Julianus) "Judicium communi dividundo, familiæ herciscundæ, finium regundorum, tale est, ut in eo *singulæ personæ duplex jus habeant: agentis, et ejus, quo cum agitur.*"—fr. 37. § 1. D. 47. 7. (Ulpianus) "Mixtæ sunt actiones, *in quibus uterque actor est:* utputa finium regundorum, familiæ herciscundæ, communi dividundo, Interdictum Uti possidetis, Utrubi."—See *Savigny*, System. Vol. 5. p. 150 seqq.

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officers consisted of the clerks of the court (*scribæ*) who recorded the proceedings, the lictores, and the attendants of the court (*accensi et præcones*).

The old Roman civil process was conducted before two different judicial officers to one of whom the legal direction of the cause belonged, while the investigation of the facts together with the decision of the case was left to the other; hence it was divided into two parts, viz. *jus* and *judicium*. On this division of the judicial functions was founded the *ordo judiciorum privatorum*. The *magistratus juri dicundo*, or *magistus* simply (i. e. the judge appointed by the state), had the *jus;* that is to say, he received the action, heard the defendant, appointed a judex, and gave him at the same time his instructions as to the legal principles according to which the action was to be judged. The judex, a private person chosen from the class of people who were constitutionally eligible, had the *judicium;* that is to say, he investigated the facts of the case, examined the witnesses, and settled the dispute by passing sentence in accordance with his instructions. Sometimes, however, by way of exception, the magistratus undertook the *judicium;* that is to say, he did not appoint a judex, but investigated the case and pronounced the decision himself. This was called *extra ordinem cognoscere, extraordinaria cognitio, judicium extraordinarium*. The *judicium extraordinarium* grew more and more common in course of time, until the appointment of a judex gradually ceased altogether. In this manner, long before Justinian's time, probably as early as that of Diocletian, the ancient *ordo judiciorum privatorum* came to an end; since all the *judicia* had then become *extraordinaria*.

A principal division of actions is that which comprises them all under the heads of *real* and *personal* actions. To *real actions* belong the petitory, or those which claim the right of property or some other real right (viz. the rei vindicatio, actio Publiciana, actio confessoria et negatoria, actio hypothecaria, &c.); likewise the *actiones prejudiciales*, which relate to the general capacity for rights and to family rights. To *personal actions* belong all suits brought to enforce a performance on the part of some certain person obliged, whether the obligation arises from a contract or from some lawful or unlawful act on the side of one party alone. Here too belong the so-called *actiones adjectitiæ qualitatis*, which have this peculiarity that they may be brought against a third person (e. g. the *institor*, or the *magister navis*), who has become bound by the acts of the contracting parties; as e. g. the *actio . . . . . institoria* against the owner of a manufactory, or the *actio . . . . . exercitoria* against the *exercitor* of a ship. So also the *actiones in rem scriptæ*, which, although personal in their origin, may yet be brought against a third possessor of the thing (viz. the *actio quod metus causa*, the *actio ad exhibendum*, &c.); furthermore, the possessorial actions (*interdicta adipiscendæ, recuperandæ*, and *retinendæ possessionis*). With respect to these last, it is said in fr. 1. § 3. D. 43. 1. "Interdicta omnia, licet in rem videantur concepta, vi tamen personalia sunt." We may regard as of an intermediate nature between real and personal ac-

B. Division of Actions.

1. With respect to their Origin.

§ 194. The actions that occur in the Roman law are divided, according to their *origin*, as follows: 1. They are either *actiones civiles* or *honorariæ*, according as they are grounded in the civil law, or have been introduced through the edicts of the prætors or of the ædiles (*actiones prætoriæ et ædilitiæ.*)[a] 2. They are again divided into *actiones vulgares s. directæ*, and *non vulgares s. in factum.*[b] *Vulgares* or *directæ actiones* are actions founded upon certain legal obligations which from the first were strictly defined and recognised as actionable, and for which fixed and independent forms were used, that were drawn up either *in jus* or *in factum*,[c] according as the plaintiff's right was founded on the civil or on

(*a*) fr. 25. § 2. D. 44. 7. "Omnes autem actiones aut civiles dicuntur aut honorariæ." Comp. § 3. J. 4. 6.

(*b*) As a matter of history connected with the Roman system of actions, it may be remarked, that before the lex Æbutia the actions in use were the "actiones in jus" and the "condictiones certi," which bore the name of actiones vulgares. After the lex Æbutia was enacted, the prætor granted, through his formulæ in jus conceptæ, the so-called actiones in factum (see next note); and the practitioners introduced the condictiones or actiones incerti. In consequence thereof the term "actio nes vulgares" came to be used in contradistinction to "actiones in factum;" and by the latter were undorstood the civilis actio incerti, the præscriptis verbis in factum actio, and the actiones utiles. fr. un. D. 13. 2. (Paulus) "Si obligatio *lege nova* introducta sit, nec cautum eadem lege, quo genere actionis experiamur, *ex lege* agendum est." —fr. 25. pr. D. 44. 7. "Actionum genera sunt duo," &c. § 195. See note *c*.

(*c*) In some cases even double formulæ existed. *Gaius*, IV. § 45–47. "Sed eas quidem formulas, in quibus de jure quæritur, *in jus conceptas vocamus*; quales sunt, quibus in-

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tions, those which are called *mixtæ actiones*: because, although real in themselves considered (as e. g. the hereditatis petitio), they may also extend to personal performances; or because, although personal in themselves (as e. g. the actio familiæ herciscundæ, communi dividundo, finium regundorum), they suppose a real right on the part of the plaintiff.

Personal actions are either *actiones ex contractu* or *ex delicto*. Again, *actiones ex contractu* were either *stricti juris* or *bonæ fidei actiones*. They were *stricti juris*, when they were founded on transactions concluded in the strict civil law form, i. e. by *stipulatio*; since the judex could not then deviate from what the formula of stipulation literally contained. *Bona fides* was here not taken into account; consequently no attention was paid to *dolus*, *vis*, or *metus*, or to the circumstances and intentions of the contractors. In the *actiones bonæ fidei*, on the contrary, these things were all considered; and in case e. g. consent was not voluntarily given, the judge could pronounce the contract invalid. Accordingly, the *actiones stricti juris* related to a *certum*, while the *actiones bonæ fidei* were directed to an *incertum*, in so far as the determination of the object depended on what the judge considered reasonable and right. In the *bonæ fidei actiones*, the judex could take cognizance of exceptions, accidental articles agreed upon by the parties, *usuræ moræ*, &c.; and this he did by virtue of the clause contained in the prætor's instructions, "EX FIDE BONA," or "UTI INTER BONOS AGIER OPORTET," or "QUANTUM ÆQUIUS MELIUS."

Actiones ex delicto were either *rei persecutoriæ*, when brought to enforce the delivery of a thing or to obtain compensation for damage actually sustained; or *pœnales*, when they aimed at a private penalty (as e. g. the *actio furti*, which had for its object the *duplum* or *quadruplum*); or *mixtæ*, which had both purposes in view (as e. g. the *actio vi bonorum raptorum* of the party robbed, for a *quadruplum*), viz. the obtaining of compensation for damage and the payment of a penalty.

the prætorian law.[a] Hence it is not without reason that there is said to be a civil law and a prætorian *in factum actio*.[b] The *non vulgares* or *in factum actiones*, in the stricter sense, are actions without any settled or at least independent forms.[c] To this class belong: *a*. The *utiles actiones*, or actions formed analogically after the *directæ actiones*; since the prætor permitted an *actio utilis* in many cases which bore a resemblance to the legal relation that formed the ground of the *actio directa*, though the latter was not originally intended for them.[d] As a particular kind of *actiones utiles*, we may mention the *fictitiæ actiones*, which were founded on a fiction of law.[e] All *actiones utiles*, and consequently the *fictitiæ actiones*, were of prætorian origin. *b*. The *præscriptis verbis actiones*, which took place when an action was founded on a *civilis obligatio*, but to which, on account of the peculiar nature of the case, none of the established *civiles formulæ* were exactly suited; so that for this reason a *formula in jus concepta* was given with a *præscriptio*, i. e. the peculiar modifications of the case were given at the commencement of the formula.[f] *c*. The *actiones in factum* (in the strictest sense), which rested altogether on the æquitas of the prætor, and were always drawn up in the manner required by the peculiar circumstances of each case, so that none of the existing forms were employed.[g]

tendimus nostrum esse aliquid jure Quiritium, aut nobis dare oportere, aut pro fure damnum (decidere oportere: in) quibus juris civilis intentio est. § 46. Ceteras vero *in factum conceptas vocamus*, id est in quibus nulla talis intentionis conceptio est, sed initio formulæ nominato eo, quod factum est, adjiciuntur ea verba, per quæ judici damnandi absolvendive potestas datur; qualis est formula, qua utitur patronus contra libertum, qui eum contra edictum prætoris in jus vocat, nam in ea ita est: "Recuperatores sunto; si paret illum patronum ab illo liberto contra edictum illius prætoris in jus vocatum esse, recuperatores illum libertum illi patrono sestertium X millia condemnanto, si non paret absolvunto." Ceteræ quoque formulæ, quæ sub titulo de in jus vocando propositæ sunt in factum conceptæ sunt, velut adversus eum, qui in jus vocatus neque venerit, neque vindicem dederit; item contra eum, quive exemerit eum, qui in jus vocatur; et denique innumerabiles ejusmodi aliæ formulæ in albo proponuntur. § 47. Sed ex quibusdam causis prætor *et in jus et in factum conceptas formulas proponit*, velut depositi et commodati. Illa enim formula, quæ ita concepta est: "Judex esto; quod Aulus Agerius apud Numerium Negidium mensam argenteam deposuit, qua de re agitur, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex bona fide, ejus judex Numerium Negidium Aulo Agerio condemnato, nisi restituat: si, non paret, absolvito" *in jus concepta est*. At illa formula, quæ ita concepta est: "Judex esto: si paret, Aulum Agerium apud Numerium Negidium mensam argenteam deposuisse, eamque dolo malo Numerii Negidii Aulo Agerio redditam non esse, quanti ea res erit, tantam pecuniam judex Numerium Negidium Aulo Agerio condemnato: si non paret, absolvito" *in factum concepta est*. Similes etiam commodati formulæ sunt. *Mühlenbruch*, Cession. 3d Edition. Note 313.

(*a*) *Gaius*, IV. 45–47.—*Heffter* in libro observatt. ad Gaii Comm. IV. c. 12. 13.—*Zimmern*, R. G. Vol. 3. § 51. 54.—*Mühlenbruch*, Cession. 3d Ed. p. 156. *Heimbach* in Linde's Zeitschrift. Vol. 11. No. 2.—fr. un. D. 13. 2.

(*b*) See *Heimbach*, l. c. and *Elvers* in the Neue Themis. No. 2. Art. 12.

(*c*) fr. 1. pr. fr. 11. D. 19. 5.

(*d*) fr. 21. D. 19. 5.—fr. 47. § 1. D. 3. 5.—fr. 29. § 7. fr. 53. D. 9. 2. With respect to these utiles actiones, see especially *Mühlenbruch*, Cession. § 15.—*Heffter*, l. c. p. 56.—*Zimmern*, R. G. § 54.

(*e*) *Gaius*, IV. 34–36.—*Ulpian*, 18. 12. Comp. also *Schweppe*, R. G. § 256.

(*f*) *Gaius*, IV. 130–132.—*Heffter*, l. c. p. 54.—*Zimmern*, R. G. § 55. They were also called actiones in factum. fr. 13. § 1. fr. 22. D. 19. 5.; but they were actiones civiles, as follows from fr. 15. ibid. fr. 7. § 2. D. 2. 14.—const. un. § 13. C. 5. 13.

(*g*) fr. 1. pr. fr. 11. D. 19. 5.—fr. 25. § 1. D. 44. 7.

2. With respect to their Foundation.

§ 195. With respect to their *foundation*, actions are either *in rem*, or *in personam*, or *mixtæ actiones*.[a]

1. *In rem actio* denotes, in a wider sense, every action founded on an absolute right, and which accordingly can be instituted against any one who invades or disputes such right. In this sense it comprises also the *actiones præjudiciales*, i. e. actions for maintaining a status and for enforcing family rights.[b] In its more restricted meaning, the term *actiones in rem* signifies only actions on account of property and real rights, and for supporting the right of inheritance. These actions are sometimes called by the Roman law, *vindicationes*.[c] *Actiones in rem* are employed for the purpose of effecting a judicial recognition of the plaintiff's right, and of thereby putting a stop to the violation of the same.

2. *In personam actiones*, which in the modern law are sometimes termed *condictiones*,[d] are such as are brought to enforce the performance of an obligation; accordingly they can be maintained only against those persons who are especially bound to fulfil it.[e] These actions are as various in their grounds as are the obligations to which they relate; and hence, like them, they are founded either on a contract or a relation similar to a contract (*actiones ex contractu vel quasi ex contractu*), or on a delict or an offence resembling a delict (*actiones ex delicto vel quasi ex delicto*), or else on a legal precept (*actiones s. condictiones ex lege*). The following deserve to be mentioned here, as particular kinds of *actiones in personam: a.* Personal actions *ex contractu vel quasi ex contractu*, are either *actiones directæ* or *contrariæ:* according as they pursue the enforcement of an obligation which is essential to a contract, and which therefore exists immediately after entering upon the same; or as they are brought merely for the payment of a counter-claim, which has afterwards arisen therefrom only accidentally and under certain conditions.[f] *b.* Actions from contracts, as a general rule, can be

(*a*) See especially *Thibaut*, Versuche. Vol. 2. No. 2.—*Feuerbach*, Civ. Vers. No. 8. —*Du Roi* in the Archiv Civ. Prax. Vol. 6. p. 252 seqq. p. 386 seqq.—*Hasse* in the Rhein. Mus. Vol. 6. Nos. 1 and 6.

(*b*) § 13. J. 4. 6. "Præjudiciales actiones in rem esse videntur: quales sunt per quas quæritur, an aliquis liber, an libertus sit, vel de partu agnoscendo."—Dig. 40. 12.—Cod. 7. 16.—Comp. also fr. 1. § 2. D. 6. 1. fr. 5. § 18. D. 25. 3.—const. 9. C. 8. 47.—*W. H. Puchta*, Klagen. § 16–18.

(*c*) fr. 25. pr. D. 44. 7. "Actionum genera sunt duo: in rem, quæ dicitur *vindicatio:* et in personam, quæ *condictio* appellatur. *In rem actio* est, per quam rem nostram quæ ab alio possidetur, petimus: et semper adversus eum est, qui rem possidet." Comp. also § 1. J. 4. 6. *Gaius*, IV. 1. 3. 5.

(*d*) *Gaius*, IV. 5. 18.—§ 15. J. 4. 6.—fr. 1. D. 13. 2.—fr. 25. pr. D. 44. 7. "*In personam actio* est, qua cum eo agimus qui obligatus est nobis ad faciendum aliquid, vel dandum; et semper adversus eundem locum habet."—fr. 41. pr. D. 44. 7.—fr. 24. D. 12. 1.—*Volckmar*, Diss. de condictionum indole et natura. Halle, 1777.—*Gans*, Röm. Obligationenrecht. Treatise 1.—*W. H. Puchta*, l. c. § 19. 20. With regard to the history of the condictiones, comp. *Savigny*, System. Vol. 5. Appendix 14.

(*e*) *Gaius*, IV. 2.—§ 1. 15. J. 4. 6.—*Donelli* Comm. jur. civ. lib. 21. c. 1. 2.

(*f*) E. g. fr. 17. § 1. fr. 18. § 4. D. 13. 6.—

brought only against him who has bound himself by the contract, and his heirs: although in some cases they may also be instituted by way of exception against a third person, who for a special reason has become bound by the act of one of the contracting parties; and then they are called *actiones adjectitiæ qualitatis.*[a] *c.* To personal actions arising from delicts belong also the *interdicta* for the maintaining of possession; because they can never be instituted against any but those who forcibly disturb us in the possession of a thing, or have forcibly deprived us of it; although many reckon them among the *in rem actiones.*[b]

3. By *actiones mixtæ* are usually meant, in this connexion, those actions which in one respect may be regarded as real, and in another as personal actions;[c] viz. *a.* the three actions for division, *actio familiæ herciscundæ, communi dividundo,* and *finium regundorum;* since these have for their object partly the division of property hitherto held in common, and partly the fulfilment of certain personal obligations in which one of the parties is bound to the other;[d] *b.* the *actiones in rem scriptæ,* i. e. those personal actions which, in certain cases, may also be brought against a third possessor of the thing, as e. g. the *actio quod metus causa.*[e] But, properly speaking, all these so-called *actiones mixtæ* are nothing more than personal actions.[f]

8. With respect to their Object.

§ 196. With respect to their *object*, actions are: 1. Either *actiones rei persequendæ causa comparatæ* (s. c. *rei persecutoriæ*), or *actiones pœnales*, or *actiones mixtæ.*[g] To the *actiones rei persequendæ causa comparatæ* belong all the *actiones in rem*, and those of the *personales actiones* which are brought for the delivery of a thing or to recover

fr. 8. § 2. D. 3 5.—fr. 1. § 8. D. 27. 4. It is in another sense that, with respect to servitudes and other real rights, an action may be brought on the part of the obligee, pursuing the contrary to that which the actor demands. fr. 8. pr. D. 8. 5. In opposition to the *contrarium judicium* the other action is called also *principalis actio* or *rectum judicium.* fr. 17. § 1. fr. 18. § 4. D. 13. 6.

(*a*) fr. 5. § 1. in fin. D. 14. 1.—*Puchta,* l. c. § 25.

(*b*) fr. 1. § 3. D. 43. 1. The interdicts are viewed as real actions by *Du Roi,* l. c. p. 425; but see contra, *Hasse,* l. c. p. 197.

(*c*) *W. H. Puchta,* § 21. Respecting another signification of the term *actio mixta,* see § 196.

(*d*) § 20. J. 4. 6.

(*e*) fr. 9. § 6. 8. fr. 14. § 3 5. D. 4. 2. The "actiones in rem scriptæ" applied to no other rights than those of obligation.

(*f*) *Vinnius* ad § 1. Inst. 4. 6.—*Hübner,* Berichtigungen zu den Institutionen. p. 120.—*Löhr* in his Mag. Vol. 4. § 17. *Heise* and *Cropp,* Jur. Abh. Vol. 1. No. 9.

(*g*) *Gaius,* IV. 6–9. "Agimus autem interdum, ut *rem* tantum consequamur; interdum, ut *pœnam* tantum; alias, ut rem et pœnam. § 7. *Rem tantum* persequimur, velut actionibus ex contractu agimus. § 8. *Pœnam tantum* consequimur, velut actione furti et injuriarum, et secundum quorundam opinionem actione vi bonorum raptorum: nam ipsius rei et vindicatio et condictio nobis competit. § 9. *Rem* vero *et pœnam* persequimur, velut ex his causis, ex quibus adversus infitiantem in duplum agimus, quod accidit per actionem judicati, depensi, damni injuriæ legis Aquiliæ, aut legatorum nomine, quæ per damnationem certa relicta sunt."—§ 16. 19. J. 4. 6.—*Savigny,* System d. Röm. R. Vol. 5th. Berlin, 1841. p. 37 seqq.

damages.[a] *Actiones pœnales* are such *actiones ex delicto* as are employed to enforce the payment of a private penalty, which among the Romans consisted for the most part in the defendant's forfeiting to the plaintiff double, triple, or quadruple the amount of the loss or damage inflicted.[b] *Actiones mixtæ* in this meaning are those *actiones ex delicto* which are designed to effect both the delivery of the thing or compensation for damages, and the payment of a private penalty.[c] 2. Or *actiones speciales, vel generales, vel de universitate;* according as they are brought to compel the delivery of one or several single things, or the surrender of an estate, or of a universitas facti (§ 149).[d]

4. With respect to Judicial Proceedings.

§ 197. With respect to the different judicial proceedings to which they gave rise, actions were either *actiones stricti juris* (*judicia* in their

(*a*) § 16–19. J. 4. 6. "Sequens illa divisio est, quod quædam actiones *rei persequendæ* gratia comparatæ sunt, quædam *pœnæ persequendæ*, quædam *mixtæ* sunt. § 17. Rei persequendæ causa comparatæ sunt omnes in rem actiones. Earum vero actionum, quæ in personam sunt, *eæ quidem quæ ex contractu nascuntur, fere omnes rei persequendæ causa comparatæ videntur;* veluti quibus mutuam pecuniam vel in stipulatum deductam petit actor; item commodati, depositi, mandati, pro socio, ex empto, vendito, locato, conducto. Plane si depositi agatur eo nomine, quod tumultus, incendii, ruinæ, naufragii causa depositum sit; in duplum actionem Prætor reddit; si modo cum ipso, apud quem depositum sit, aut cum herede ejus ex dolo ipsius agitur; quo casu *mixta est actio.* § 18. Ex maleficiis vero proditæ actiones aliæ tantum *pœnæ persequendæ* causa comparatæ sunt: aliæ *tam pœnæ quam rei persequendæ*, et ob id *mixtæ* sunt. Pœnam tantum persequitur quis actione furti: sive enim manifesti agatur quadrupli, sive nec manifesti dupli, de sola pœna agitur. Nam ipsam rem propria actione persequitur quis, id est, suam esse petens: sive fur ipse eam rem possideat, sive alius quilibet. Eo amplius adversus furem etiam condictio est rei. § 19. Via autem bonorum raptorum *actio mixta est*, quia in quadruplo rei persecutio continetur; pœna autem tripli est. Sed et legis Aquiliæ actio de damno injuria dato *mixta est*, non solum si adversus infitiantem in duplum agatur, sed interdum et si in simplum quisque agat, veluti, si quis hominem claudum aut luscum occiderit, qui in eo anno integer et magni pretii fuerit; tanti enim damnatur, quanti is homo eo in anno plurimi fuerit, secundum jam traditam divisionem. Item *mixta est actio* contra eos, qui relicta sacrosanctis ecclesiis, vel aliis venerabilibus locis, legati vel fideicommissi nomine, dare distulerint usque adeo, ut etiam in judicium vocarentur; tunc enim et ipsam rem vel pecuniam, quæ relicta est, dare compelluntur, et aliud tantum pro pœna, et ideo in duplum ejus fit condemnatio."

(*b*) § 21–25. J. ibid. "Omnes autem actiones vel *in simplum* conceptæ sunt, vel *in duplum*, vel *in triplum*, vel *in quadruplum:* ulterius autem nulla actio extenditur. § 22. *In simplum* agitur, veluti ex stipulatione, ex mutui datione, ex empto, vendito, locato conducto, mandato: et denique ex aliis compluribus causis. § 23. *In duplum agimus*, veluti furti nec manifesti, damni injuriæ ex lege Aquilia, depositi ex quibusdam casibus, item servi corrupti; quæ competit in eum, cujus hortatu consiliove servus alienus fugerit, aut contumax adversus dominum factus est, aut luxuriose vivere cœperit, aut denique quolibet modo deterior factus sit: in qua actione earum etiam rerum quos fugiendo servus abstulit, æstimatio deducitur. Item ex legato, quod venerabilibus locis relictum est, secundum ea, quæ supra diximus. § 24. *Tripli* vero [agimus], cum quidam majorem vera æstimatione quantitatem in libello conventionis inseruit, ut ex hac causa viatores, id est executores litium, ampliorem summam sportularum nomine exigerent. Tunc enim id, quod propter eorum causam damnum passus fuerit reus, in triplum ab actore consequetur: ut in hoc triplo et simplum, in quo damnum passus est, connumeretur; *quod nostra constitutio introduxit, quæ in nostro Codice fulget*, qua, dubio procul est, ex lege condictitiam emanare § 25. *Quadrupli autem agitur*, veluti furti manifesti. Item de eo, quod metus causa factum sit, deque ea pecunia, quæ in hoc data sit, ut is, cui datur, calumniæ causa negotium alicui faceret, vel non faceret. Item ex lege condictitia, quæ a nostra constitutione oritur, in quadruplum condemnationem imponens iis executoribus litium, qui contra nostræ constitutionis normam a reis quicquam exegerint."

(*c*) § 20. J. 4. 6.

(*d*) fr. 1. pr. § 1. 3. fr. 73. D. 6. 1. The term

stricter sense) or *actiones bonæ fidei* (*arbitria*).[a] This division related only to personal actions,[b] and especially to the distinction between *contractus stricti juris* and *bonæ fidei*. The peculiar character of the *actiones stricti juris* consisted in their being always directed to a *certum*, and to the fulfilment of unilateral obligations alone; for which reason no *contrarium judicium* could here take place.[c] In these actions the *formula judicii* was to be drawn up in strict conformity with the words of the contract, and the *condemnatio* was always to be directed to a *certum*: the *judex* was obliged to keep closely to the formula, and could pay no regard to *æquitas*; accordingly he was not allowed to adjudicate the interest (*id quod interest*) to the plaintiff, and could notice the defendant's exceptions only in case they rested on facts which destroyed the action *ipso jure*, i. e. according to the *jus civile*; unless indeed the prætor had expressly inserted in the *formula judicii* an *exceptio*, by which the action founded on the *jus civile* might be rendered ineffectual. The *actiones bonæ fidei* were always brought for an *incertum*. Thus the prætor in such actions always added to the *formula judicii* the clause: *et quanto æquius melius*, or *ut inter bonos agier oportet*.[d] Thereby the *judex* (who was here called *arbiter*) received the power not only of attending to the principles of strict law, but likewise of taking into consideration that which was understood of itself from the principles of natural law and *ex fide bona*. He was therefore also under the necessity of adjudicating the interest to the plaintiff, in case the contract was not performed through the fault of the debtor, and likewise of acquitting the defendant on grounds of equity, e. g. on account of fraud and force, even though he was not especially directed so to do in the *formula judicii*:[e] the defendant too had the right to bring in his counter-claims as far as they had originated *ex eadem causa*.[f] At present, according to the views prevailing in Germany, no attention is any longer due to the Roman distinction between *actiones stricti juris* and *bonæ fidei*, as all contracts are considered to be *bonæ fidei*.[g] In certain actions, real as well as personal, the prætor,

judicia generalia occurs in another meaning in fr. 38. pr. D. 17. 2.

(*a*) *Gaius*, IV. 61–68.—§ 28–30. J. 4. 6.—*Gans*, Scholien zu Gajus. p. 388. Idem, Röm. Obligationenrecht. Treatise 1. (Reviewed by *Mühlenbruch* in the Heidelberger Jahrbücher for 1821. p. 47 seqq.)—*Elvers*, Beitr. zur R. W. p. 69.—*Stever*, Comm. de summario Romanorum judicio sive de stricti juris et bonæ fidei actionibus. Leipsic, 1822.—*Heffter*, Instit. des Civilprocesses. p. 384–393. and in libro observatt. ad Gaii institutt. Comm. IV. p. 76.—*Zimmern*, R. G. Vol. 3. § 60 seqq. —*Bethmann-Hollweg*, Versuche über den Civilprocess. p. 37 seqq.—*S. A. Mayer*, Von der Litiscontestatio. p. 73 seqq.—*Rosshirt* in his Z. f. Civ. u. Crim. R. P. 1. No. 3.—*W. H. Puchta*, Von den Klagen. § 18.—*Savigny*, System. Vol. 5. Appendix 13.—*Burchardi*, Von der Wiedereinsetzung in den vorigen Stand. § 18.

(*b*) The hereditatis petitio was first declared by Justinian to be an actio bonæ fidei, in const. 12. § 3. C. 3. 31.—§ 28. J. 4. 6.

(*c*) *Cicero* pro Roscio Com. c. 4.—*Gaius*, III. 137.—§ 3. J. 3. 22. (23.)

(*d*) *Cicero*, Top. c. 17. de off. 3. 15 and 17.

(*e*) For here the principle applied: dolum abesse oportere, or exceptionem doli iis inesse, fr. 6. § 9. D. 19. 1.—fr. 84. §. 5. D. 30.—fr. 21. D. 24. 3.

(*f*) *Gaius*, IV. 61.—§ 30. J. 4. 6.

(*g*) *Gundling*, Diss. de usu practico actionum bonæ fidei et stricti juris. Halle, 1724. Contra: *Balthasar*, Diss. de eod. arg. Greifs-

especially when the defendant seemed clearly to be in the wrong, placed it in the *arbitrium* of the *judex*, to charge the defendant, immediately and without previous investigation, to satisfy the plaintiff on account of his claims. If then the defendant would not conform to the *arbitrium* of the *judex*, the matter was investigated in the usual way; and the defendant, according as it turned out, was acquitted or condemned. In the latter case, as he had not been willing to come to accommodation in a bad cause, he was subjected by way of punishment to several injurious consequences. Thus the judge could now adjudicate *ex æquo et bono* the whole interest to the plaintiff, and in certain cases could condemn the defendant even *in quadruplum*.[a] This kind of actions, commonly termed *actiones arbitrariæ*,[b] are also not used in Germany.*

C. *Concurrence of Actions.*[c]

§ 198. A *concurrence* of actions which exists wherever *several* actions meet in one and the same person, may be of two principal kinds, viz. *objective* and *subjective*.

walde, 1737. — *Bezzenberger*, Diss. de eod. arg. Heidelberg, 1817.

(*a*) *Gaius*, IV. 163–165.—§ 31. J. 4. 6. and *Theophilus* on the same.—fr. 14. § 3. in fin. § 4. D. 4. 2.—fr. 2. pr. fr. 3. D. 13. 4.—fr. 68. in fin. D. 6. 1.—*Heffter* in libro Obs. cit. c. 13. 16.—*Keller*, Litiscontestation. § 27.—*Zimmern*, R. G. Vol. 3. § 67. 68.—*Benfey* in the Rhein. Mus. Vol. 4. p. 311.

(*b*) The term *arbitrium* has a meaning different from that of *actio arbitraria*; for the arbitrium generally left something to the discretion of the judex, but the actiones arbitrariæ resembled the proceedings before justices of the peace. It is therefore said in § 31. J. 4. 6; "quasdam actiones *arbitrarias*, id est *ex arbitrio judicis pendentes*, appellamus; in quibus, nisi arbitrio judicis is, cum quo agitur, actori satisfaciat, veluti rem restituat vel exhibeat vel solvat, condemnari debeat." The actiones arbitrariæ applied as well to real as to personal rights; and after the ancient system of proceeding became obsolete, the judgment (arbitrium) upon actiones arbitrariæ, when given by the competent judex, implied a public condemnatio. *Savigny*, System. Vol. 5. § 221–224. Comp. however *Ribbentrop* ad L. 16. § 5. D. de pignor. et L. 9. § 1. D. de except. rei jud. § 2–4.

(*c*) *Cujacii* Obs. lib. 8. c. 24. — *Donelli* Comm. jur. civ. lib. 21. c. 3.—*H. A. Vianen* de concursu actionum. Utrecht, 1736. and in

* The Roman system of actions in its application in Germany is modified, it is true, in many particulars, as will be shown in the course of this work, under the different legal relations to which the actions apply; but in general it is still in full operation at the present day. According to the canon law indeed, it is no longer necessary to use the technical Roman names of the actions; but in drawing up the statement of his case (*libellus*), the lawyer must have a clear and precise idea as to the corresponding action of the Roman law, and the nature of the Roman action thus chosen as a precedent must be perfectly evident to the court from the libel. He has therefore to ascertain what Roman action is applicable to the circumstances of the case presented to him. If he finds that several actions concur, then, in case they cannot be cumulated or made subsidiary the one to the other, he chooses that action which according to the circumstances or the condition or wishes of the party will best secure his object and avoid the exceptions that may be raised against the demand,—which will require the least amount of evidence,—or which will insure the earliest decision of the case. The judge too on his part has to examine the action according to the requisites attached to it by the Roman law. The principal questions which the judge has to propose to himself in this respect, are: 1. What action is instituted? (*quæ actio est instituta?*) 2. Is the action which is brought well founded? (*actio instituta estne fundata?*) 3. Is the action thus well founded proved? (*actio fundata estne probata?*) 4. Has it not been defeated by an exception? (*actio probata nonne est elisa?*)

1. An *objective* concurrence is when one plaintiff has several actions against one and the same defendant.[a] This again is either: *a.* A *cumulative* concurrence, when the several actions are directed to different objects and aims, so that none of them excludes the other, but each can be instituted with its appropriate effect.[b] Such a concurrence exists when the several actions are founded on the *same* unlawful act,[c] or when they proceed from *different* lawful or unlawful acts,[d] always provided that they differ from each other in the purposes for which they are brought by the plaintiff. *b.* Or an *elective* concurrence, when the several actions rest indeed on different grounds, but pursue the same principal aim. Here the entitled party has the choice which action he will bring, and when he cannot attain his end with one of them, he has still the right of instituting the others;[e] but if he be successful with the one first chosen, all the other actions are lost, except in as far as he can obtain with one of them some portion of his right which was not covered by the first.[f] *c.* Or an *alternative* concurrence, when the several actions proceeding from the same ground are directed to different objects, of which however the entitled party, according to the choice allowed him, has the right only to demand either the one or the other. When in such case he has once made his choice, the action thus brought destroys all the rest, whether he triumphs or is defeated therein.[g] *d.* Or a *successive* concurrence, when one of the actions can be brought only after the other. Such is the case when one action is pre-judicial or preparatory with regard to the other,[h] or when one of the actions on account of its nature can be brought only once, although after it *other* actions are still admissible.[i]

Oelrich's Thes. diss. nov. Belg. Vol. 1. T. 1. —*Glück*, Comm. Vol. 4. § 284. *a.* seqq.—*Schmidt*, Com. de concursu actionum. Jena, 1753. — *Meisner*, Diss. de concursu et cumulatione actionum. Gottingen, 1794.—*F. C. De Savigny*, Diss. de concursu delictorum formali. Marburg, 1800. § 4. 9. especially *Thibaut*, Civ. Abh. No. 9. and *Baklesse*, de concursu actionum civilium. Liege, 1830. — *W. H. Puchta*, Klagen. § 29–33. 36–39.

(*a*) According to the Roman law, two actions could not be maintained for the same matter at the same time, except only in the case of actiones pœnales, fr. 53. pr. D. 44. 7. —fr. 88. D. 47. 2.—fr. 32. 60. D. 44. 7.—fr. 130. D. 50. 17.—*Savigny*, System. Vol. 5. p. 205 seqq.—*Rosshirt*, Grundsätze des Strafrechts. p. 125 seqq. The distinctions on which the principles stated in the text are founded, were established by modern practice.

(*b*) fr. 45. D. 17. 2.—fr. 27. pr. D. 9. 2.—fr. 11. § 2. D. 11. 3.—fr. 54. § 3. D. 47. 2.—fr. 7. § 1. D. 13. 1.—fr. 60. D. 44. 7.—fr. 130. D. 50. 17.—*Savigny*, l. c. § 7.

(*c*) E. g. § 19. J. 4. 1.—fr. 5. § 8. D. 13. 6. fr. 29. pr. D. 16. 3. Comp. fr. 54. § 1. D. 47. 2.

(*d*) fr. 18. D. 44. 7.—fr. 2. § 1. 4. D. 47. 1.

(*e*) fr. 76. § 8. D. 31.—const. 1. C. 6. 43.—fr. 18. § 3. D. 13. 5.—fr. 93. § 1. D. 32.—fr. 12. § 1. D. 41. 2.—const. 14. C. 3. 28.

(*f*) fr. 28. D. 19. 1.—fr. 34. pr. in fin. D. 44. 7.—fr. 47. D. 17. 2.

(*g*) fr. 19. D. 31.—fr. 112. pr. D. 45. 1.—fr. 4. § 2. fr. 7. D. 18. 3.—fr. 9. § 1. D. 14. 4.—fr. 4. § 3. D. 9. 4.—const. 4. C. 4. 54. Some jurists admit here an exception with respect to a plaintiff who has withdrawn the action first instituted, before judgment, in order to seek his remedy in another. *Linde*, Lehrbuch des Civilprocesses. § 157.—*Bayer*, Ueber die Aenderung des Klaglibells. p. 68.—*Glück*, Comm. Vol. 20. p. 152. Contra *Thibaut*, l. c. p. 157. 170.

(*h*) fr. 23. § 5. D. 6. 1.—fr. 3. § 6. D. 10. 4.—fr. 1. § 1. D. 10. 2.—const. 20. C. 3. 36.—const. 13. C. 3. 32.

(*i*) fr. 20. § 4. fr. 44. pr. D. 10. 2.—fr. 4. § 2. D. 10. 2.—Comp. *Linde*, Lehrbuch des Civilprocesses. § 56. 115. 329.

2. A *subjective* concurrence is when an action may be brought either by several plaintiffs against one defendant, or by one plaintiff against several defendants, or by several plaintiffs against several defendants. The rule here is, that all the several actions may be instituted, either simultaneously or in succession,[a] excepting when one of the several plaintiffs or defendants is entitled or obliged only so far as his co-plaintiff or co-defendant has not already received or granted[b] the object of the debt.*

(*a*) § 2. J. 4. 4.—fr. 41. D. 15. 1.—fr. 1. § 17. D. 14. 1.—fr. 1. § 10. fr. 2. fr. 3. D. 9. 3.—const. 5. C. 5. 51.—See *Linde*, l. c. § 157.

(*b*) § 1. J. 3. 16. (17.)—fr. 32. pr. D. 15. 1.—fr. 6. § 4. D. 4. 9.—fr. 11. § 8–10. fr. 28. D. 44. 2.—const. 28. C. 8. 41.

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* The Editor gives the following examples, to facilitate the understanding of the many different cases in which a concurrence of actions may take place:

I. *Objective Concurrence.* This is of the following kinds: *a. Cumulative*, e. g. when each of several actions may be instituted at the same time, and may pursue its own separate objects and aims: 1. In consequence of *one and the same unlawful* act. The owner of a thing stolen, for instance, can at the same time institute the *condictio furtiva*, in order by its means, as an actio rei persecutoria, to recover the stolen object; and also the *actio furti* as an actio pœnalis, in order thereby to obtain a private satisfaction for the injury (the duplum or quadruplum). 2. In consequence of *different lawful* acts. A socius for instance has, as such, an action against the heirs of his late partner, and the *actio negotiorum gestorum* for such transactions as he has undertaken on behalf of the estate of the deceased, after the dissolution of the partnership. 3. In consequence of *different lawful and unlawful* acts. A plaintiff, for instance, may have against a defendant who has killed a horse which he borrowed from him, the *actio legis Aquiliæ*, and the *locati conducti actio*.

b. Elective: e. g. the plaintiff has an *actio ex contractu* and the *legis Aquiliæ actio*. If with one of them he does not obtain all he seeks, he can afterwards institute the other. Or he has the *condictio furtiva* and the *rei vindicatio*. If he succeeds completely with the action he has chosen, then he cannot employ the other.

c. Alternative: e. g. if the plaintiff makes choice of the *actio personalis ex testamento*, he loses the *querela inofficiosi*; or if he chooses the *redhibitoria*, he loses the *quanti minoris actio*.

d. Successive: e. g. the plaintiff first brings the *actio ad exhibendum* for the exhibition of the will, and afterwards enforces his claims that are founded thereon by another action; or he first institutes the *hereditatis petitio*, and brings thereafter the *familiæ herciscundæ actio*.

II. *Subjective Concurrence.* This is either *active*, *passive*, or *mixed;* according as actions *co-existing for the same object or purpose and having different effects, may* be instituted by several plaintiffs against one defendant, or by one plaintiff against several defendants, or lastly by several plaintiffs against several defendants: and this may be done, according to circumstances, either *severally* or *jointly*. By this therefore is not meant the case of a *litis consortium* (which does not belong at all to the theory of the private law, but is purely a matter of practice). For *litis consortium* means only the case where several parties sue or are sued *jointly*. In order to enable several parties to *join* in an action or to sue others as *joint* defendants, it is requisite that the claim or liability should have arisen *ex eodem fundamento obligationis*. Such *litis consortium* may likewise be *active*, *passive*, or *mixed;* according as a plurality of parties occurs jointly on either or on both sides. It is plain therefore that concurrent actions may be brought by or against *litis consortes;* since *litis consortium* and *concurrence of actions* are things totally independent of each other. Hence it is the *plurality of actions*, whether objective or subjective, that forms the distinguishing characteristic of concurrence; while the *unity of proceeding* (in a single action or actions, or in concurrent actions) *between a plurality of litigants* forms the characteristic of the *litis consortium*. We will here give a few examples of subjective concurrence. An *active* concurrence exists, for instance, when a married woman receives an injury; in which case her husband, as well as her father or father-in-law, is entitled to bring in her name the actio injuriarum against

*D. Transition of Actions.**

§ 199. 1. Actions descend, as a general rule, by *successio per universitatem*, both actively to the heirs of the party entitled, and passively to the heirs of the party obliged, and that *ipso jure*. This rule, however, is subject to the following exceptions: *a.* The *actiones pœnales*, ex-

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the offender. Or when one transfers a claim, in which case the *cedens* as well as the *cessionarius* has an action thereon against the debtor. If one of them is satisfied, the other, it will be evident, can no longer bring a suit. A *passive* concurrence exists, for instance, where a purchaser may bring a personal action against the vendor, and a *vindicatio* against the possessor of the thing. Or when several debtors and sureties are liable *in solidum*, the creditor, it is true, has his action against all the obligees, yet he can only recover so far as his claim has not been satisfied by one or the other of them. A *mixed* concurrence takes place, for instance, where the giver of the *dos* and the wife herself are each entitled to bring an action for its recovery, against the heirs and sureties of her late husband.

A *pre-judicial* action is one on whose previous decision (*præ-judicium*) another depends, and the favourable decision of which is requisite in order to sustain the latter; e. g. the *actio de partu agnoscendo* is pre-judicial with respect to the action for maintenance (*alimentatio*). An action is called *preparatory*, when its result merely prepares the way for or promotes the success of another; as e. g. the *actio ad exhibendum* is preparatory to the *hereditas petitio* or the *rei vindicatio*.

It may be added here that *Savigny* (System, Vol. 5. p. 204–261.) objects to the classification of concurrent actions given above in the text. He assumes that every concurrence of actions rests exclusively on a connexion of juridical object and purpose; since it is by means of this connexion alone that actions can exert an influence upon one another. And hence he derives the principle, that what has been obtained by one action cannot be again demanded by another; and moreover, that all concurrence is essentially objective, although it may be incidentally subjective. The result at which he arrives is the division of concurrent actions into three classes, viz. 1. *Complete concurrence*, where the result of one action absorbs the other. 2. *Partial concurrence*, where after one action has been brought, the other may be instituted in order to reach the end which has been attained only in part by the first. 3. *Non-concurrence*, where the actions stand in no connexion whatever, and exert no influence one upon the other; as for instance where they proceed from entirely different legal transactions, and where consequently either or both of them can be brought at pleasure.—This is all simple and correct, although it contains nothing new. But as the distinctions adopted by Mackeldey in the text indicate most fully the different relations in which actions may occur, and as they have been long established and are still retained by nearly all civilians, the Editor does not consider it advisable to reject them. He would only object to the assuming of a concurrence of actions where they stand in no internal connexion at all, as where a cumulative concurrence of actions is said to arise from "different" acts (see § 198. 1. *a.*). In such a case, where actions have naught in common with each other, or at most are only *seemingly* concurrent, it is certainly not very appropriate to consider them, as Savigny does, as forming a class of concurrent actions.

* The doctrine of the transmission of actions is of great importance for all parts of the private law. The fundamental rule is, that *all actions are transmitted*, whether for or against the heirs. And this holds good to such an extent, that even those actions that are excepted from the rule, are still transmitted in almost all cases where the litis contestatio (or, according to the German law, the service of process—*communicatio libelli*) took place in the testator's lifetime. There are, however, the following exceptions:

I. All transmission of actions, whether *active* or *passive*, is excluded,

1. In *criminal actions*. The active transmission is excluded because such actions may be brought by any member of the community, and because the heirs, though they are not themselves the prosecutors, would be exposed to the risk and responsibility which rests upon an accuser; the passive transmission is excluded, because the punishment for unlawful acts should fall on the offender, and not on his heirs.

cept the *actio injuriarum*, pass over to the heirs of the injured party;[a] but they cannot be brought against the heirs of the offender,[b] unless these have been enriched by their testator's delict.[c] *b.* The *actiones quæ vindictam spirant*, i. e. those actions which a man, without having suffered an actual loss of property, may bring out of mere resentment for personal injuries, do not descend to the heirs of the plaintiff; although he himself may institute them against the defendant's heirs,[d] excepting

(*a*) *Gaius*, IV. 112.—§ 1. J. 4. 12. and *Theophilus* on the same.—*Marezoll* in Löhr's Mag. Vol. 4. (2.) p. 363.

(*b*) fr. 1. pr. D. 47. 1.—fr. 111. § 1. D. 50. 17.—fr. 22. D. 39. 1.—*Thibaut*, Syst. § 68.

(*c*) fr. 38. 127. D. 50. 17.—const. un. C. 4. 17. *Francke*, Erläut. Vol. 1. p. 5.—*Rosshirt* in his Zeitschrift. Vol. 2. No. 3.

(*d*) fr. 6. § 2. fr. 7. D. 5. 2.—const. 5. 34. C. 3. 28.—const. 7. 10. C. 8. 56.

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2. In *actiones populares*, when no *litis contestatio* has taken place. The active transmission is excluded here for the same reason given above, viz. because they may be brought by any one, and consequently do not belong in particular to any man as his right, that is, they are not a part of a man's individual estate (*pars bonorum*); and the passive is excluded because the retributive consequences of a prohibited act should fall upon the guilty party alone.

II. *Active* transmission is excluded,

1. In the *actiones vindictam spirantes*; since these actions are brought for the infliction not of pecuniary penalties, but of personal punishment, and the heirs cannot be presumed to entertain the vindictive feelings of the injured party. The *actio injuriarum*, the action for the restoration of a gift on account of gross ingratitude, &c. are examples of this class. If, however, the suit has already been contested, or according to the German law, if the action was instituted and the process served in the testator's lifetime, it always descends to the heirs.

2. In the *querela inofficiosi testamenti*. The non-transition of this action is owing to the wish of the Romans to restrict it in every way as much as possible, because it rested on the odious presumption that the maker of the inofficious will must have acted under a moral derangement of mind. Yet here we meet with the singularity that a mere declaration made by the disinherited party during the testator's lifetime, that he intended to institute the *querela*, suffices to transmit the action to the heirs.

III. *Passive* transmission is excluded,

1. In actions for a penalty of a purely private nature (*actiones privatæ mere pœnales*).

2. In *actiones rei persecutoriæ ex delicto*, that is actions arising from a delict and brought for the delivery of a thing, the performance of an act, or the recovery of damages.

According to the civil law, both of these kinds of actions took place against the heirs only in as far as they had become enriched (*in id quod ad eos pervenit*). But by the canon law, which here very justly adopts the principle, *Ubi commoda, ibi et incommoda*, this is so far extended, that the heirs are made liable for the testator's obligations ex delicto to the whole extent of the estate inherited, if necessary. This extension has always been recognised in practice, and is now universally adopted. The liability of the heirs depends therefore no longer on their being in possession of a gain acquired through the testator's delict.

3. In all legal relations: *a.* which, by precept of law or conventional agreement, are extinguished by death, as partnership, mandate, personal servitudes, marriage, &c. *b.* or which were dependent on a personal act of the testator, and which from their nature, on account of personal qualities and considerations, cannot pass over to another.

4. In *actiones in rem*, when the heirs are not in possession of the thing. For, possession (comp. *Savigny*, Recht des Besitzes. § 28.) does not pass over by the mere acquisition of the right of inheritance, but requires an apprehension (§ 240) of the thing on the part of the heir; and a real action is to be brought against the actual possessor. Even in the case where the testator has given up possession from a dishonest design, the suit which may be brought against the heirs resembles rather an action for delict than a real action.

in as far as they have their ground in a delict.[a] But an *actio pœnalis* or *quæ vindictam spirat* once pending, always descends to and against the heirs of the parties.[b] The fact that an action prosecutes a dolus, does not by any means in itself hinder the transition of such action to the heirs. 2. The transfer of single actions to another during the lifetime of the entitled party by means of *successio singularis*, can be effected only by cession or delegation.

E. Duration of Actions.

1. Rule.

§ 200. Every action must by its nature become extinct as soon as the right ceases to the prosecution of which it is directed. But as long as the right lasts, it depends on the entitled party, according to general principles, whether and when he will bring his action. This was also the rule in the older Roman law, i. e. actions generally speaking were perpetual (*perpetuæ*); and only in some, especially the prætorian actions, a certain term was specified, within which they were to be instituted on pain of losing them. These were hence termed *actiones temporales*, in opposition to the *perpetuæ*.[c] In the modern Roman law, on the contrary, a term of thirty years is for the most part prescribed to every action that before was perpetual;[d] so that at the expiration of the legal term, it may be defeated by the *temporis exceptio s. præscriptio*. This extinction of actions on account of the party's neglect to institute them within the term prescribed by law, is called by modern jurists the *prescription* (limitation) *of actions*,[e] and this is a species of the so-called *extinctive prescription*.[f]

2. Exceptions to the Rule.

§ 201. The rule of the modern Roman law, that actions become extinct in thirty years from the time when the legal right to bring them accrues, is subject to the following exceptions: 1. Some actions are not, during a certain time, subject to any limitation. To these belong actions of the wife for the recovery of such objects belonging to her dower as were disposed of by her husband during the continuance of their marriage;[g] the actions of family-sons (*filiifamilias*), on account of their *peculia adventitia*, which the father has unlawfully dis-

(*a*) § 1. J. 4. 12.—fr. 13. pr. D. 47. 10.
(*b*) fr. 26. 33. 58. D. 44. 7.—fr. 139. pr. fr. 164. D. 50. 17.
(*c*) *Gaius*, IV. 110.—pr. J. 4. 12.
(*d*) const. 3–8. C. 7. 39.—Cod. 7. 40.
(*e*) *Thibaut*, Ueber Besitz und Verjährung, p. 117.—*Pfeiffer*, Verm. Aufs. No. 7.—*Dabelow*, Verjährung. Vol. 2. p. 135 seqq.—*Unterholzner*, Verj. Vol. 2. p. 256 seqq.—*Göschen*, Grundr. zu Pand. Vorl. p. 63–72.—*Reinhardt*, Von der usucapio und præscriptio. p. 232.—*W. H. Puchta*, Klagen. § 41–44.
(*f*) const. 3. C. 7. 39.—"ex quo jure competere cœperunt."—const. 7. § 4. C. ibid.
(*g*) const. 30. in fin. C. 5. 12.—Comp. *Thibaut*, System des Pand. R. § 1024.

posed of, during the continuance of his parental power;[a] and the actions of pupils while they are *impuberes* or under guardiansbip.[b] 2. Other actions are extinguished in forty years from the time of their accruing. To these belong actions on account of the public property and patrimonial property of the ruler; the actions of churches, charitable institutions, and cities;[c] and the *actio hypothecaria*, in so far as it may be brought against the debtor himself and his heirs.[d] When an action has been abandoned after a *litis contestatio*, it does not become extinct until forty years after the last judicial proceedings, although it might otherwise have become extinct by limitation in a shorter period (*præscriptio litis pendentis*).[e] 3. Lastly, all the old *actiones temporales* which have always been limited to a shorter term than thirty years, are still confined to their former period of prescription.[f] Here too especially belong all prætorian actions *ex delicto*; the *interdicta* for protection against violent disturbance of possession; and also actions for restitution, the *actiones ædilitiæ*, and the *querela inofficiosi testamenti*.[g]

3. Special Principles.

§ 202. With regard to the extinction of actions by limitation, the following rules are to be observed: 1. The reason for the limitation of actions is founded solely on the negligence of the party entitled, and on his omission to prosecute his right; hence according to the Roman law *bona fides* is not requisite on the part of a defendant who pleads prescription.[h] 2. But according to the canon law all real actions, and also such personal actions as seek the restitution of a thing, are not subject to limitation, in case the possessor of the thing is *in mala fide*; all other personal actions for debt, will always be lost by prescription, even though the defendant should be *in mala fide*.[i] 3. The limitation

(*a*) const. 4. C. 6. 61.—const. 1. § 2. C. 7. 40. —Nov. 22. c. 24.

(*b*) const. 3. C. 7. 39.—"sed *pupillari ætate* duntaxat huic eximenda sanctioni." The prescription of 30 years commences therefore in regard to minors from the time that they attain puberty. But the prescription of *actiones temporales*, to which an impubes is entitled, commences at the time of his arriving at majority. const. 5. C. 2. 41.—*Fritz* in Löhr's Mag. Vol. 4. p. 284.—*Göschen*, Grundr. §. 71.

(*c*) const. 4. 6. C. 7. 39.—const. 14. C. 11. 61. The length of time required to establish a prescription (limitation) against actions brought by churches and charitable institutions, was fixed at 100 years by the earlier constitutions of Justinian (const. 23. C. 1. 2.—Nov. 9.); but it was afterwards reduced by him to 40 years, Nov. 111. Nov. 131. c. 6.—According to the canon law, the Romish church still enjoys the right to bring actions within 100 years after the cause of action arises. c. 16. 17. C. 16. qu. 3.—cap. 13. 14. 17. X. 2. 26.—cap. 2. de præscript. in 6to. *Thibaut*, Verjährung. § 29.

(*d*) const. 7. § 1. C. 7. 39.

(*e*) const. 9. C. 7. 39.—const. 1. § 1. C. 7. 40. *Linde* in his and Marezoll's Zeitschrift. Vol. 2. p. 153.

(*f*) const. 3. C. 7. 39.—"Hæ autem actiones annis triginta continuis extinguantur, quæ perpetuæ videbantur, *non illæ quæ antiquis temporibus limitabantur*."

(*g*) pr. J. 4. 12.—fr. 28. D. 21. 1.—fr. 8. § 17. fr. 9. D. 5. 2.

(*h*) const. 8. § 1. C. 7. 39. "Si vero mala fide," &c.—See the Editor's note to this section.

(*i*) cap. 5. X. 2 26. "Vigilanti studio cavendum est, ne malæ fidei possessores simus in prædiis alienis: *quoniam nulla antiqua dierum possessio juvat aliquem malæ fidei*

of an action begins only at the time when the right to such action legally accrues,[a] and when the plaintiff has it in his power to institute the same.[b] 4. In actions of thirty or forty years' limitation, the term is always a *tempus continuum;* in some *actiones temporales* it is a *tempus utile* (§ 182): but in all cases the limitation is not completed until the last day of the term (*dies novissimus*) has wholly passed.[c] 5. The limitation of an action may be interrupted by the bringing of the action itself and the *litis contestatio* consequent thereupon;[d] or by making a protest in the proper form;[e] or by an acknowledgment on the part of the debtor either expressly or tacitly made, within the term of limitation.[f] 6. The effect of the limitation of an action consists solely in producing

possessorem, nisi resipuerit, postquam se aliena noverit possidere, cum bonæ fidei possessor dici non possit. Ephesinus enim legislator solum propter vitandum miserorum segnitiem et longi temporis errorem et confusionem, primus tricennali vel quadragenali præscriptioni vigorem legis imposuit. *Nobis autem tam in rebus cognitis, quam latentibus placuit non habere vigorem.*" Cap. 20. X. ibid. "Quoniam omne, quod non est ex fide, peccatum est, synodali judicio definimus, *ut nulla valeat absque bona fide præscriptio tam canonica, quam civilis.* Cum generaliter sit omni constitutioni atque consuetudini derogandum, quæ absque mortali peccato non potest observari. Unde oportet, ut, qui præscribit, in nulla temporis parte rei habeat conscientiam alienæ." St. Paul's Epistle to the Romans chap. 14. verse 23.—*Müllenthiel*, Ueber die Natur des guten Glaubens bei der Verjährung. Erlangen, 1820. § 23.—*Unterholzner*, Verjährung. Vol. 1. p. 313.—*Walter*, Kirchenrecht. 5th Ed. § 358. Concerning the different opinions see: *Thibaut*, Verjährung. § 20. note 4.—*Pfeiffer*, l. c. p. 342.—*Dabelow*, l. c. p. 299.—*Höpfner*, Comm. § 1182.—*Spangenberg* in the Archiv Civ. Prax. Vol. 6. p. 379. and in *Hagemann's* Pract. Erört. Vol. 8. Div. 2. No. 17.—*Savigny*, System. Vol. 5. § 244 seqq.

(*a*) const. 3. C. 7. 39.—const. 7. § 4. C. ibid. "Illud autem plus, quam manifestum est, quod in omnibus contractibus in quibus sub aliqua conditione, vel sub die certa vel incerta, stipulationes et promissiones vel pacta ponuntur, *post conditionis exitum. vel post institutæ diei certæ vel incertæ lapsum, præscriptiones XXX vel XL annorum, quæ personalibus vel hypothecariis actionibus opponuntur, initium accipiunt.* Unde evenit, ut in matrimoniis, in quibus redhibitio dotis vel ante nuptias donationis in diem incertam mortis vel repudii differri solet, post conjugii dissolutionem earundem curricula præscriptionum personalibus itidem actionibus vel hypothecariis opponendarum initium accipiant." const. 1. § 1. C. 7. 40. "Ad hæc cum nihil prohibet etiam ea, quæ aliquam dubitationem acceperunt clarioribus et compendiosis sanctionibus renovari: jubemus, omnes personales actiones, quas verbosa quorundam interpretatio extendere extra metas XXX annorum conabatur, XXX annorum spatiis concludi: nisi legitimus modus qui et veteribus et nostris legibus enumeratus est, interruptionem temporis introduxerit, sola hypothecaria actione XL annorum utente curriculis. Nemo itaque audeat neque actionis familiæ herciscundæ, neque communi dividundo, neque finium regundorum, neque pro socio, neque furti, neque vi bonorum raptorum, neque alterius cujuscunque personalis actionis vitam longiorem esse XXX annis interpretari; *sed ex quo ab initio competit et semel nata est*, et non iteratis fabulis sæpe recreata, quemadmodum in furti actione dicebatur, *post memoratum tempus* finiri: exceptis omnibus actionibus, licet personales sint, quæ in judicium deductæ sunt, et cognitionalia acceperunt certamina, et postea silentio traditæ sunt: in quibus non triginta, sed quadraginta annos esse expectandos, ex quo novissimum litigatores tacuerunt, lex nostra antea promulgavit."—fr. 9. § 3. D. 13. 7.—*Thibaut*, Verjährung. § 43.—*Weber* zu Höpfner. § 1182. Comp. also: *Krätzer*, Observat. de controversia: ex quo tempore jus, quod venditori ex pacto de retrovendendo competit, ab eo exerceri nequeat. Mayence, 1829.

(*b*) Hence the rule: Agere non valenti non currit præscriptio.—*Rosshirt*, Deutsch. Civ. R. I. § 45.—*Savigny*, System. Vol. 5. § 239–241.

(*c*) fr. 6. D. 44. 7. "In omnibus temporalibus actionibus, nisi novissimus totus dies compleatur, non finitur obligatio." *Unterholzner*, Verjährung. Vol. 1. p. 300.—*Löhr* in the Archiv Civ. Prax. Vol. 11. p. 419.—*Schweppe*, Röm. Priv. R. Vol. 1. p. 376. See also the writings cited above, § 182. note *b*.

(*d*) const. 9. C. 7. 39.—const. 2. C. 3. 19.—const. 10. C. 7. 32.—const. 1. 2. 10. C. 7. 33.—*Unterholzner*, Verjährung. § 122 seqq.

(*e*) const. 2. 3. C. 7. 40.—*Löhr's* Mag. Vol. 4. p. 379.

(*f*) E. g. const. 7. § 5. const. 8. § 4. C. 7. 39.—fr. 18. § 1. D. 13. 5.—const. 5. C. 8. 40.—const. 19. C. 4. 21.—Comp. *Höpfner*, Commentar. Edited by A. D. Weber. § 1182 seq.

an exception (*exceptio, præscriptio*) against the action. Hence it follows that the extinction of the right of action does not imply the loss of the whole right on the part of the claimant; for this can still be made available in other ways than by an action,[a] as e. g. by exception.*

7. A restitution is never granted in cases where the term of limitation is thirty years or longer.[b]

(*a*) Hence the rule: Quæ ad agendum sunt temporalia, ad excipiendum sunt perpetua. —fr. 5. § 6. D. 44. 4. (Paulus) "Non sicut de dolo actio certo tempore finitur, ita etiam exceptio eodem tempore danda est, *nam hæc perpetuo competit:* cum actor quidem in sua potestate habeat quando utatur suo jure; is autem, cum quo agitur, non habeat potestatem, quando conveniatur."—const. 5. C. 8. 36. "Licet Unde vi interdictum intra annum locum habeat, *tamen exceptione perpetua* succurri ei, qui per vim expulsus post retinuit possessionem, auctoritate juris manifestatur."—const. 6. C. ibid. "Si pactum intercessit, *in exceptione sine temporis præfinitione de doli replicare potes.*"—const. 2. C. 8. 31. "Intelligere debes vincula pignoris durare personali actione submota."—fr. 2. D. 44. 3. compared with fr. 59. D. 21. 1. — fr. 2. cit. (Marcellus) "In tempore constituto judicatis an intercalaris dies proficere judicato, necne, debeat, quæritur: Item de tempore, quo lis perit? sic sine dubio existimandum est, ut auctum litis tempus intercalari die existimetur; veluti si de usucapione sit quæstio, quæ tempore constituto expleri solet: aut de actionibus, quæ certo tempore finiuntur, ut æditiæ plerœque actiones; et si quis fundum ea lege vendiderit, *ut nisi in diebus triginta pretium esset solutum, inemtus esset fundus,* dies intercalaris proficit emtori: mihi contra videtur. — fr. 19. pr. cit. (Pomponius) "Si pœnæ causa ejus, cui debetur, debitor liberatus est, *naturalis obligatio manet, et ideo solutum repeti non potest.*" The following writers agree with Mackeldey in the opinion stated above, that prescription only extinguishes the right of action and *not the right itself: Donelli* Comm. jur. civ. lib. 22. c. 2. in fin.—*Weber,* Nat. Verb. § 92. and in his Beitr. zu den Klagen und Einreden, No. 1. p. 6 seqq. 52 seqq. — *Thibaut,* Verjährung. § 39. — *Dabelow,* Verjährung. Vol. 2. p. 203.—*Glück,* Comm. Vol. 13. p. 100. 380. Vol. 20. p. 162. *Guyet* in the Archiv Civ. Prax. Vol. 11. p. 62.—*Von der Pfordten,* ibid. Vol. 24. No. 4.—*Francke,* Civ. Abh. p. 73. — *Unterholzner,* Verjährung. Vol. 2. § 258.—*Rosshirt* in his Zeitschrift No. 2. p. 156. Vol. 2. No. 3.—*Savigny,* System. Vol. 5. p. 376. §§ 247–8. The opinion that prescription extinguishes the *right* itself is maintained by *Kori,* Verjährung. § 52. 95. *Sommer,* Rechtswissenschaftliche Abh. Vol. 1. No. 1.—*Linde,* Lehrb. Civ. Process. 2d Edition. § 156. Notes 12, 13.—*Wening,* Civilrecht. § 43. 255.—*Löhr* in the Archiv Civ. Prax. Vol. 10. p. 70.—*Heimbach* in the Z. f. Civ. R. u. P. Vol. 1. p. 436.—*Vermehren,* ibid. Vol. 2. p. 319. 337. and *Büchel,* Ueber die Wirkung der Klagenverjährung. Marburg, 1832. Idem, in his Civilrechtliche Erörterungen. No. 3. in the Appendix. — *Thibaut,* System. 7th Edition. § 1056. 1062. at least in regard to the prescriptio longissimi temporis.

(*b*) const. 3. 4. C. 7. 39.—*Unterholzner.* l. c. Vol. 1. § 136. 137.—*Burchardi,* Von der Wiedereinsetzung in den vorigen Stand. Gottingen, 1831. p. 135.

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* The Roman law distinguishes between the four following kinds of prescription: 1. *Usucapio,* and *præscriptio longi temporis* of ten or twenty years, which is analogous to the usucapio, and was introduced for things not susceptible of usucapio. 2. *Præscriptio immemorialis s. indefinita.* 3. *Amissio servitutum per non usum.* 4. *Extinctio actionum per decursum temporis legibus definiti* (generally of thirty or forty years, but sometimes more and sometimes less). The return of a sum paid on account of a gaming-debt, for instance, might be claimed even until the expiration of fifty years; and on the other hand, the *querela inofficiosi testamenti* or *inofficiosæ donationis,* and the action of the state on account of smuggling, expires in five years; the prætorian restitution, in four years; the *actio quanti minoris,* in one year; and the *redhibitoria,* in six months.

That which characterizes every prescription is, that an actual is converted into a legal condition by the lapse of a certain time, whether such lapse of time *establishes* rights or *destroys* them. The principal distinction now made with respect to prescription is the division of it into *acquisitive* and *extinctive* prescription (*præscriptio acquisitiva et extinctiva*), according as the acquisition or extinction of a right is made the immediate consequence of the lapse of time. The Prussian law very appropriately terms the former *prescription by possession,* and the latter *prescription by non-user.* These answer the former to the *prescription,* the latter to the *limitation* of the English common law.

II. Litis Contestatio.[a]

§ 203. 1. The *litis contestatio* was, in the older Roman proceedings, a bilateral act of the parties. For when the plaintiff had announced (*edidérat*) the action which he intended to bring, and the prætor had granted the same, a day was then designated for the discussion of the matter. At the day appointed, the plaintiff stated his cause of action; and the

(*a*) Cod. 3. 9.—*Donelli* Comm. jur. civ. lib. 24. c. 1.—*Winckler*, Discrimen inter litis contestationem jure veteri et hodierno. Leipsic, 1751.—*Vossler*, Diss. de litis contestatione Romanorum. Tubingen, 1808. — *Glück*, Comm. Vol. 6. § 499.—*Goldschmidt*, Ueber Litiscontestation und Einreden. Frankfort, 1812.—*Spengel*, on the same subject. Munich, 1827.—*Linde*, Abh. aus dem Civ. Proc. No. 1.—*Keller*, Ueber Litiscontestation und Urtheil nach class. Röm. Recht. Zurich, 1827.—*Sintenis* in Zu-Rhein's Jahrbücher. Vol. 1. No. 7. —*Zimmern*, R. G. Vol. 3. § 118 seqq.—*Mayer*, Von der Litiscontestatio. Stuttgart, 1830.—*Danz*, Diss. de litis contestatione, quæ fuit tempore legis actionum. Jena. 1831. *Bethmann-Hollweg*, Process des sink. R. R. p. 258 seqq.

As regards the *præscriptio actionum*, according to the Roman law, the mere lapse of time was sufficient to protect the defendant against any subsequent suit. The canon law, on the contrary (cap. 5. 20. X. 2. 26.), requires the defendant to have been in *bona fide* during the whole time of the prescription. Many understand this precept of the canon law as applying to acquisitive prescription alone, and not to the prescription of actions. In practice, however, *bona fides* has always been regarded as requisite both in acquisitive and in extinctive prescription: and justly so, for the passages here cited from the canon law make *bona fides* a requisite to every kind of prescription. The French law (Code Civil, art. 2262), however, does not require good faith in him who seeks to avail himself of prescription against an action.

Limitation begins from the moment when the right of action has arisen (*actio nata*). A right of action arises, i. e. becomes legally capable of being prosecuted without any thing further, as soon as the obligation is due, e. g. as soon as the condition agreed upon is accomplished or the time appointed has arrived, or e. g. as soon as the debt is paid off and the return of the pawn may be demanded; or in bilateral obligations, as soon as the performance is completed or at least tendered on one side. When the running of the time of limitation is *interrupted*, all the time which has already elapsed is wholly lost; in order to become entitled to the *exceptio præscriptionis*, we must accordingly begin the term anew from the time of the interruption. And hereby an interruption is essentially distinguished from a *suspension* of prescription. This latter may indeed hinder the beginning of a prescription: in case, however, the prescription has already begun, it has no effect on the time already elapsed, but only hinders its proceeding so long as the impediment remains; e. g. a suspension would take place in the case of a *justitium* (when the courts are closed), or when the ownership of a thing for the delivery of which I am prosecuted falls to a minor, or when the thing assumes the quality of a *dos* before the period of prescription is completed: in these cases the prescription stops (*præscriptio dormit*) as long as the minority or the marriage continues. The plaintiff's absence or ignorance of his rights does not hinder the course of prescription.

The interruption may be effected by either of the following acts: 1. The defendant's acknowledgment of the debt, e. g. by paying interest, furnishing sureties, giving a pledge, &c. Here a limitation could take place only in case the creditor should suffer the whole term of prescription to expire from the time of interruption. 2. The service of process (*communicatio libelli*) upon the defendant. The Prussian law attaches this effect to the mere bringing of the cause before the court; and the same may be said of the common law of Germany as regards the filing of claims in cases of bankruptcy. According to the Roman law, it was necessary that the *litis contestatio* should follow (§ 203). 3. A mere demand of payment (*interpellatio*) will not suffice to interrupt the prescription; and even a protestation will be held sufficient only where the plaintiff has no other means at his command. But in such cases of necessity, a judicial protestation is sufficient, if e. g. the defendant be absent: and even one made extrajudicially will suffice, if the plaintiff cannot obtain access to a court. 4. *Mala fides superveniens* of course

defendant answered thereto, either confessing the facts which formed the ground of the action (*confessus in jure*), or denying them, or else opposing exceptions by which he sought to defend himself against the action (§ 204). All these acts taken together,* that is the plaintiff's statement of his claim and the defendant's answer thereto, were termed LITIS CONTESTATIO.[a] By means of the *litis contestatio* the suit came to be pending (*lis pendens*); and to this very important consequences were attached, of which especially the following are retained in the modern Roman law: *a.* Every kind of prescription becomes thereby interrupted, the limitation of actions as well as the usucapio on the

(*a*) The term *litis contestatio* arose from the old Roman custom according to which the plaintiff in opening the proceedings called upon the by-standers to act as witnesses, which act was called *antestari* or *contestari*. *Festus* de verb. signif. sub voce: *contestari*. Therefore it is always said of the plaintiff: actor litem contestatur. fr. 28. D. 46. 2. (Papinianus) "Fundum Cornelianum stipulatus, quanti fundus est, postea stipulor; si non novandi animo secunda stipulatio facta est, cessat novatio: secunda vero stipulatio tenet, ex qua non fundus, sed pecunia debetur. Itaque si reus promittendi fundum solvat, secunda stipulatio jure non tollitur: *nec si litem actor ex prima contestetur*; denique meliore vel deteriore facto sine culpa debitoris postea fundo, præsens æstimatio fundo petito recte consideretur: in altera vero ea æstimatio venit, quæ secundæ stipulationis tempore fuit."—fr. 3. § 10. D. 46. 7.—fr. 11. pr. D. 13. 7.—fr. 35. § 2. D. 12. 2. so likewise in the const. un. C. 3. 9. "Inter litem contestatam et editam actionem permultum interest. *Lis enim tunc contestata videtur, cum judex per narrationem negotii causam audire cœperit.*"—Nov. 96. c. 1.—Of the defendant, on the other hand, it is said: judicium accipit. fr. 28. § 2. D. 5. 1.—Comp. *Martin*, Civilprocess. § 143.

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interrupts the prescription, since the canon law has made *bona fides* a requisite to every prescription, and demands good faith throughout, from first to last.

The view taken in the text (see No. 6.), that limitation does not destroy the whole legal right of the plaintiff, seems to be erroneous, although it finds many advocates. In justification of this view, it is affirmed that the exception which remains is something wholly different from the action; that the bringing of an exception does not depend on the choice of the party, but depends on the action's having been instituted; and consequently that the exception cannot be disallowed as a punishment for negligence. This course of argument is decidedly fallacious. For the principal object in view in introducing the limitation was to effect a *finis litium*: this aim would be entirely frustrated, the unsettled state of things transmitted to succeeding generations, and the debtor placed in a very unfavourable position as regards the proof of his discharge, if the creditor were allowed an unlimited period for the enforcement of his right. Moreover, it is distinctly declared in fr. 5. D. 41. 10.—fr. 6. D. 44. 7.—fr. 37. D. 46. 1.—fr. 25. § 1. D. 47. 8.—const. 5. C. 8. 6.—const. 9. C. 7. 39. and Nov. 8. that by the præscriptio longissimi temporis the entire right is always lost, and that the debtor becomes perfectly free from the obligation; this is likewise stated to be the case in the prescription of a shorter period, where the creditor, besides the exception, had also a right of action. This view prevails in practice, and has also been adopted in several modern codes. *Code Civil*, art. 1234. 2219. *Austrian Code*, § 1479. § 1499. *Prussian Code*, I. 9. § 501 seq. § 564.

* In consequence of the dissolution of the *ordo judiciorum privatorum*, the *litis contestatio* was no longer the concluding act *in jure* which separated the *jus* from the *judicium*; it then became applied, by way of analogy, to the altered system of proceeding, and the LIS was considered to be CONTESTATA *post narrationem propositam et contradictionem objectam*. Thus, *litis contestatio* was used only to denote the *legal quality* which a suit assumed through the plaintiff's statement of his case and the defendant's answer thereto; but it was afterwards applied to the statement and the answer themselves (*Nov.* 96. c. 1.), and this application of it has been retained in the canon law (c. 54. X. 1. 6.—c. un. X. 2. 5.). In Germany, however, the term *litis contestatio* has been used from an early period to signify merely the *defendant's answer*. *Bayer*, Vorträge über Civilprocess. p. 240 seqq.

part of the defendant.[a] *b.* The object of the suit becomes thereby a *res litigiosa*, so that the plaintiff is no longer entitled to transfer his claim to another; nor is the defendant allowed either to alienate or make a change in the thing for the recovery of which the action is brought against him.[b] The court before which the *litis contestatio* has once taken place, will remain competent for the continuance of the suit, even though the *forum* of the defendant should become changed;[c] the defendant who contested a suit before an incompetent court without making use of the *exceptio judicis incompetentis*, cannot avail himself of this exception after the *litis contestatio*, because the latter implies a *prorogatio jurisdictionis*, or voluntary submission to the jurisdiction of the court.[d] *d.* The defendant acquires the right of instituting a cross action against the plaintiff in the same court wherein the first action was brought, even though in regard to the plaintiff the court should otherwise be incompetent.[e] *e.* From the time that the suit is contested, every possessor, though he may have been previously a *bona fide* tenant, is treated as a possessor *malæ fidei* with respect to the *omnis causa*, which is to be restored together with the principal thing.[f] *f.* Actions which would not otherwise survive either for or against heirs (§ 199), acquire this quality in consequence of the *litis contestatio*.[g]

2. In Germany the term *litis contestatio* is now employed merely to signify the *answer* of a defendant to an action brought against him, i. e. his distinct answer upon the facts alleged by the plaintiff as the ground of his action. Such an answer (*litis contestatio*) may be of an affirmative, negative, or mixed character. Its aim is to ascertain and to establish the true point of controversy between the parties; whence it is also called the *fortification* of the controversy. The effects attached to the Roman *litis contestatio*, which were noticed above under the subdivisions *a.* and *c.*, have been transferred by the German law to the first decree of the court upon the action; and they therefore take place as soon as the defendant has been served with a copy of such decree, and of the libel exhibited. But as to the transmission of the action to the heirs (see above, under *f.*), this still continues to be dependent on the suit's having been previously contested.[h]

(*a*) const. 9. C. 7. 39.—const. 10. C. 7. 32.—const. 2. 10. C. 7. 33.—const. 2. C. 3. 19.—const. 3. C. 7. 40. In regard to usucapio the following are of another opinion: *Unterholzner*, Verjährung. Vol. 2. § 186.—*Buchholtz*, Versuche. No. 11. But in opposition to const. 2. C. 3. 19. "tanquam lite — — contestata." On the præscriptio litis pendentis, see above, p. 201. note *e*.

(*b*) Dig. 44. 6.—Cod. 8. 37.—fr. 13. D. 10. 2.—fr. 12. D. 6. 1.—Nov. 112. c. 1.—Clem. 2. ut lite pendente (2. 5.).—*Spangenberg* in the Archiv Civ. Prax. Vol. 9. p. 406. Comp. also *Bülow*, Abh. Vol. 2. p. 318.

(*c*) fr. 19. pr. D. 2. 1.—fr. 7. 30. 34. D. 5. 1.—cap. 19. X. 2. 2.—cap. 20. X. 1. 29.

(*d*) fr. 51. 52. pr. D. 5. 1.—const. 13. C. 8. 36.—cap. 19. X. 1. 29.

(*e*) Nov. 96. c. 2. § 1.—cap. 3. de rescriptis in 6to.

(*f*) fr. 20. § 11. fr. 25. § 7. fr. 40. pr. D. 5. 3.—fr. 20. 45. D. 6. 1.—fr. 2. 34. 35. D. 22. 1.—const. 1. § 1. C. 3. 31.—const. 22. C. 3. 32.

(*g*) § 1. J. 4. 12.—fr. 26. 58. D. 44. 7.—fr. 87. 139. 164. D. 50. 17.—const. 5. C. 3. 28.—Cod. 1. 20.

(*h*) *Gesterding*. Irrthümer. p. 125.—*Thibaut*, System. § 68. and *Braun* on the same.

III. Exceptions.[a]

A. Their Nature.

§ 204. The *defence* of an action, according to the Roman law, could be effected in different ways, viz. 1. Either by a simple denial of the facts alleged as the ground of the action; and this is merely a negative *litis contestatio* (§ 203). 2. Or by the introduction of new facts (as e. g. that the debt has been paid or released by *acceptilatio*), by means of which the plaintiff's claim, although it might have been originally well founded, was afterwards destroyed *ipso jure*, i. e. by virtue of the *jus civile*, so that an action was no longer tenable;[b] of which the judex was obliged ex officio to take notice, even if he had not been directed to do so by the *formula judicii*. 3. Or lastly, by the defendant's appealing to facts which, although they did not *ipso jure* destroy the right of action, yet were designated by the prætor to be those on account of which he would protect him against the action ("*quia iniquum foret eum condemnari;*" as for instance when he could allege that he was led into the transaction by force or fraud, or that the debt was remitted to him by a simple *pactum de non repetendo*). Now, such means of defence as the prætor granted, from reasons of equity (*ex æquitate*) against an action founded on the *jus civile*, and which he each time especially prescribed for the consideration of the judex in the *formula judicii*, were alone called in the Roman law *exceptiones s. præscriptiones*. The action in such case was not destroyed *ipso jure*, but was rendered ineffectual by means of an *exception* (*per exceptionem, ope exceptionis.*)[c] The meaning of *exceptio*, as this term is now employed in Germany, has a much wider extent; for, by exception is understood, in contradistinction to *litis contestatio*, any objection of the defendant by which he alleges a new fact in order to defend himself against the action; no matter whether the fact be such as, according to the Roman law, would have destroyed the action *ipso jure*, or would have defeated it *per exceptionem.*[d]

(*a*) *Gaius*, IV. 116 seq.—Inst. 4. 13.—Dig. 44. 1.—Cod. 8. 36.—*Donelli* Comm. jur. civ. Lib. 22. and the writings referred to in § 193. note *a*. — *Gesterding*, Nachforschungen. p. 187. — *Knappe*, Entwicklung des Begriffs der Exceptionen. Munich, 1835.—*Albrecht*, Die Exceptionen des gemeinen deutschen Civilprocesses. Munich, 1835.—*Rosshirt* in his Zeitschrift. Vol. II. No. 3.

(*b*) *Gaius*, III. 168–181.

(*c*) *Gaius*, IV. 116 seq.—§ 1. J. 4. 13. "Verbi gratia, si metu coactus, aut dolo inductus, aut errore lapsus, stipulanti Titio promisisti, quod non debueras promittere, palam est, jure civili te obligatum esse: et actio qua intenditur, dare te oportere, efficax est: sed iniquum est te condemnari. Ideoque datur tibi exceptio quod metus causa, aut doli mali, aut in factum composita ad impugnandam actionem." § 2–5. J. ibid.—*Zimmern*, R. G. Vol. 3. § 91–95.—*Heffter*, Institutionen des Civilprocesses. p. 92 seqq. Idem, Observatt. ad Gaium. c. 22 seq.

(*d*) What is now called the *exceptio solutionis*, was therefore no exceptio in the sense of the Roman law. *Gaius*, III. 168.

B. Their Different Kinds.

§ 205. The *exceptiones*, in the original meaning of the Roman law, are founded, with respect to their *origin*, on the prætorian Edict; in later times such exceptions were also introduced through *leges* and *senatusconsulta*: whence their division into *civiles* and *prætoriæ s. honorariæ*.[a] 2. With regard to their *effect*, they are either *exc peremtoriæ s. perpetuæ*, when they destroy the action either wholly or partially for ever; or *exc. dilatoriæ s. temporales*, when they are designed only as a temporary defence against the action.[b] 3. With respect to their *subject*, they are either *exc. in personam conceptæ s. personæ cohærentes*, or *in rem conceptæ s. rei cohærentes*; according as they are either eminently personal, and hence can be alleged only by the person himself to whom they are granted by law, or as they are connected with the legal relation itself on which the suit is founded, and accordingly may be alleged by any one interested in the case, and more especially by the heirs and sureties of the principal debtor.[c]

C. Their Duration.

§ 206. Exceptions are not regularly subject to extinction by prescription, since they cannot be made available until the opposite party has instituted his suit.[d] This holds good not only of those exceptions which, according to the nature of the right on which they are founded, can never be enforced otherwise than as exceptions,[e] but also in cases where the right on which they are founded might have been prosecuted by means of an action, which however has become extinguished by limitation.[f] Still there are some exceptions which become extinct af-

(*a*) *Gaius*, IV. 118.—§ 7. J. 4. 13.

(*b*) *Cicero* de invent. II. 20.—*Gaius*, IV. 120–125.—§ 8–10. J. 4. 13. and *Theophilus* on the same.—fr. 3. D. 44. 1. "Exceptiones aut *perpetuæ* et *peremtoriæ* sunt, aut *temporales* et *dilatoriæ*. *Perpetuæ atque peremtoriæ* sunt, quæ semper locum habent, nec evitari possunt, qualis est doli mali, et rei judicatæ, et si quid contra leges senatusve consultum factum esse dicitur; item pacti conventi perpetui, id est, ne omnino pecunia petatur. *Temporales atque dilatoriæ* sunt, quæ non semper locum habent, sed evitari possunt: qualis est pacti conventi temporalis, id est, ne forte intra quinquennium agatur. *Procuratoriæ* quoque exceptiones dilatoriæ sunt, quæ evitari possunt."—*Zimmern*, R. G Vol. 3. § 95.—*Rosshirt*, Zeitschrift. Vol. 2d. p. 297.

(*c*) fr. 7. D. 44. 1.—fr. 24. 25. D. 42. 1.—§ 4. J. 4. 14. "*Exceptiones autem, quibus debitor defenditur, plerumque accommodari solent etiam fidejussoribus ejus, et recte*: quia quod ab iis petitur, id ab ipso debitore peti videtur quia mandati judicio redditurus est iis, quod ii pro eo solverint. Qua ratione etsi de non petenda pecunia pactus quis cum reo fuerit, placuit, perinde succurrendum esse per exceptionem pacti conventi illis quoque, qui pro eo obligati essent, ac si cum ipsis pactus esset, ne ab eis ea pecunia peteretur. *Sane quædam exceptiones non solent his accommodari*. Ecce enim debitor, si bonis suis cesserit et cum eo creditor experiatur, defenditur per exceptionem: "nisi bonis cesserit." Sed hæc exceptio fidejussoribus non datur; ideo scilicet, quia qui alios pro debitore obligat, hoc maxime prospicit, ut cum facultatibus lapsus fuerit debitor, possit ab iis quos pro eo obligavit, suum consequi."

(*d*) fr. 5. § 6. D. 44. 4.—const. 5. 6. C. 8. 36. —*Unterholzner*, Verj. Vol. 2. § 156–160.

(*e*) E. g. the exceptio solutionis and pacti de non petendo.

(*f*) E. g. the exceptio redhibitoria. fr. 2. D. 44. 3. compared with fr. 59. pr. D. 21. 1. Contra, *Pfeiffer*, Pract. Ausf. Vol. 3. p. 73.

ter the lapse of a certain time,[a] even though the action to which it might have been opposed be not instituted within that time.*

(a) To these belong the *exceptio non numeratæ pecuniæ*, the *exceptio dotis cautæ sed non numeratæ*, and the *exceptio non solutæ pecuniæ*; none of which however are *exceptions* in the present acceptation of the term, as illustrated by the Editor in the note below.

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* The usual distinctions that are made in exceptions are stated with sufficient clearness in the text. But in order to a full understanding of the nature of exceptions, it will be well to give in this place a few historical observations. To the old Roman law, exceptions were wholly unknown. But when the *legis actiones* had ceased, and the *litigatio per formulas* had taken their place, the prætor soon became impressed with the necessity of taking into account those facts and circumstances which forced him to regard a condemnation of the defendant in conformity with the rigour of the law, as unjust. Instead therefore of enforcing the *jus civile* unconditionally against every defendant, the prætor began to admit *exceptions* to this rule (*exceptiones*—in the literal meaning of the term). Thus in the *formula* which he gave to the judex, he instructed the latter, when the proof in support of the action was complete, to pass sentence of condemnation, "EXCEPT WHEN" (*extra quam si*, &c.) this or that fact alleged by the defendant was found to be proved. In this manner the term *exceptio* was applied only to facts which would serve to destroy the plaintiff's right upon equitable grounds; and not to those which had this effect already *ipso jure* (i. e. by the *jus civile*), as e. g. *solutio*, *novatio*, &c. In the old *jus civile*, and before the time of the prætors, there were no exceptions, and there was no need of the prætor's assistance; since the judex was obliged to observe the provisions made by the *jus civile* for the defendant's protection. Originally, therefore, the exceptions were granted by the prætor on request in single cases, as a protection against the rigour of the *jus civile*, and the judex was expressly referred to them, i. e. he was directed to take them into consideration, in case the facts on which they rested were proved. It was only in the *bonæ fidei actiones* that the defendant had no need of praying for the express insertion of his exceptions by the prætor in the formula judicii, because the latter made it here always the "general" duty of the *judex* to decide *secundum æquum et bonum*. (Judicium bonæ fidei continet in se doli mali exceptionem; or, Doli exceptiones bonæ fidei actioni insunt: i. e. in these actions the *judex* had to take cognizance of all the grounds of defence *ex bona fide* of the defendant.) By long continued use, in the course of time, certain exceptions became established in such a manner that the granting of them ceased to depend merely on the will of the prætor, but was in some measure compulsory upon him. The *jus civile* itself now began to introduce exceptions (as e. g. the exc. Scti Macedoniani, the exc. Scti Velleiani), and thus we find Gaius treating of the distinction between the exceptions of the prætorian and those of the civil law. Justinian retained the name *exceptiones*, although the term had then entirely lost its original signification; for the *exceptiones* which according to the older law were to be prayed for by the defendant before the litiscontestation took place, and were to be inserted by the prætor in the *formula*, no longer depended on the prætor's grant, after the separation of the proceedings into *jus* and *judicium* had ceased, in the time of Diocletian and Maximian.

The nature of an exception, as understood at present, is entirely different from that of the Roman *exceptio*. Practitioners indeed frequently consider as an exception all that is called so, whether in the Roman or canon law, or in the ordinary language of practice; but this leads to no other result than confusion, insomuch that it has been attempted to apply this name to every conceivable objection or assertion of the defendant. Thus, for instance, the assertion that the plaintiff on his part has not fulfilled the contract, is called *exceptio non adimpleti contractus*; this however is clearly no exception, but only a denial of one of the essential facts belonging to the plaintiff's ground of action, the proof of which consequently rests with the plaintiff. So too the so-called *exceptiones deficientis legitimationis ad causam* and *deficientis juris agendi*, are no exceptions in the true meaning of the term; for, by the former the defendant only denies that the *plaintiff* has the right of action, and by the latter that the claim entitles to an action at all. As exceptions in the stricter sense, we now regard all those independent facts (*facta nova*) by means of which the defendant represents the plaintiff's right either as *destroyed for ever* (*exceptio*

IV. Replication and Duplication.

§ 207. In like manner as the defendant may defeat an action by means of an exception, so the plaintiff may render an exception of no effect, and maintain his action, by interposing a *replication* (*replicatio*), that is by alleging new facts which destroy the exception opposed to his action.[a] The defendant's answer to the replication is called a *duplication* (*duplicatio*);[b] the plaintiff's reply to this latter is termed a *triplication* (*triplicatio*); and the answer of the defendant to the last, *quadruplication*; and so on.[c] In the ordinary process the stage of allegations is usually closed by the duplication; though it may be ex-

(*a*) fr. 2. § 1. D. 44. 1. (Ulpianus) "*Replicationes nihil aliud sunt, quam exceptiones, et a parte actoris veniunt*: quæ quidem ideo necessariæ sunt, ut exceptiones excludant; semper enim replicatio idcirco objicitur, ut exceptionem oppugnet."—fr. 22. 1. ibid. (Paulus) "Replicatio est contraria exceptio, quasi exceptionis exceptio." See especially pr. J. 4. 14.—fr. 9. § 4. D. 12. 2.—*Gaius*, IV. 126.

(*b*) § 1. J. 4. 14. "Rursus interdum evenit, ut replicatio, quæ prima facie justa est, inique noceat. Quod cum accidit, alia allegatione opus est, adjuvandi rei gratia, *quæ duplicatio vocatur*."—*Gaius*, IV. 127.

(*c*) § 2. J. 4. 14. "Et si rursus ea prima facie justa videatur, sed propter aliquam causam actori inique noceat, rursus alia allegatione opus est, qua actor adjuvetur: *quæ dicitur triplicatio*."—fr. 2. § 2. 3. D. 44. 1. (Ulpianus) "Illud tenendum est, omnem exceptionem vel replicationem exclusoriam esse: exceptio actorem excludit, replicatio reum. § 3. Sed contra replicationem duplicatio, et contra duplicationem solet dari triplicatio, et contra triplicationem rursus quadruplicatio; et ita deinceps multiplicantur nomina, dum aut reus aut actor objicit."—*Gaius*, IV. 128.

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peremtoria), or as *not enforcible for the time being* (*exc. dilatoria*). Hence it is no longer of any consequence whether such exception had its origin in the *jus civile* or *prætorium*, or indeed whether the Roman law regarded it as an exception at all or not. Therefore according to the more correct theory, novation, payment, composition, and compensation, for instance, are to be considered at the present day as exceptions; while on the contrary the Roman so-called "*exceptiones Scti Macedoniani, Velleiani*, &c. are not exceptions in the modern acceptation of the term.

Actions and exceptions agree in this respect, that they are founded on independent declarations of facts made by a party, and which in case of denial are to be proved. *Qui agit, probare oportet:* and it is with respect to this particularly that the principle holds good, *Reus excipiendo fit actor*. With this last the legal maxim, *Favorabiliores sunt partes rei quam actoris*, is not inconsistent; for this rule refers principally to a case of doubt, where sentence must be given in favour of the defendant (*In dubio pro reo*), and to the advantages which belong to the position of the party who is attacked, one of which is e. g. that the plaintiff must first produce the evidence necessary to support his case, and that when he cannot do so, the defendant is to be acquitted, without inquiring whether the latter would have been able to furnish the proofs requisite on his side or not. On the other hand, an essential distinction between actions and exceptions is to be found in their respective aims; the *former* being brought to procure a judicial condemnation and compulsion to a performance or acknowledgment, while the *latter* is designed to procure an acquittal merely. The Prussian law allows and enjoins upon the judge to supply *ex officio* the exception of prescription and the other so-called "*exceptiones juris*," in case the defendant does not appeal to them. But according to the common law of Germany, the judge is not entitled to do so, except in the single case where the exception is fatal to the legality of the proceedings, as e. g. the *exceptio deficientis legitimationis ad processum* (the attorney's want of authority to represent the plaintiff), or the *exc. deficientis fundamenti agendi legalis* (the want of a legal ground of action).

tended still further than even a quadruplication. This rule, however, applies to all cases, that the defendant must have the last word.

The replications, duplications, and all further replies of the parties to one another, must in general be regarded as *exceptions*, and hence as not subject to limitation;[a] still a right of action which has become extinct by prescription can no longer be employed as a replication.[b]

V. Res Judicata.

§ 208. 1. In like manner as the *litis contestatio* formed the conclusion of the first stage of the old Roman proceedings, the *res judicata* formed the close of the second stage; and on it was founded the *execution* which was obtained by means of the *actio rei judicatæ*.[c] 2. In the law of Justinian its place is occupied by the *final judgment* of the examining judge himself (*sententia, definitiva sententia*), as the former separation of *jus* and *judicium* had disappeared long before; and in Germany with respect to civil causes, the same judge who has the examination of the case, is required also to determine it by pronouncing the final sentence.[d] The effects of a *res judicata* are these: viz. that it produces, *a.* a formal truth (*res judicata pro veritate habetur*), that is to say, the decision is placed beyond objection, and constitutes the law between the parties; and, *b.* an exception (*exceptio rei judicatæ*), by which a party may defend himself against other claims from the same cause (§ 198).

CHAPTER IV.

EXTRAORDINARY PROSECUTION OF RIGHTS.

The Roman law contains two remedies which are distinguished by the peculiar proceedings to be observed in making use of them. These were especially employed for the purpose of *preserving* or *restoring* legal relations which already existed or had existed, and were termed *interdicta* and *restitutiones*. The *interdicts* are designed to prevent violence, disorder, or injuries; and the *restitutions*, to preserve the reason and equity of the law against the strictness of the jus civile.

INTERDICTS.

§ 209. The interdicts were formulas by which the proper magistrate, on the motion of the plaintiff, imposed an injunction or prohibition on the defendant.[e] They originated in the *imperium* of the prætor,[f] and

(*a*) fr. 2. § 1–3. fr. 22. § 1. D. 44. 1.—const. 6. C. 8. 26.
(*b*) fr. 9. § 4. D. 12. 2.
(*c*) See the works cited, p. 204. note *a.*; and comp. *Martin*, Civilproc. § 109. 254.
(*d*) *Bethmann-Hollweg*, Process des sink. R. R. p. 272.
(*e*) *Gaius*, IV. § 139.—pr. J. 4. 15.
(*f*) Prætor aut proconsul auctoritatem suam finiendis controversiis præponit.

were made use of in all the departments of the legal system, especially where actions could not be maintained: thus they were employed with regard to public places, roads, and rivers;[a] and in the private law, they were used for the protection of personal as well as real rights. They were applied furthermore to *possession*, sometimes where no *actio* would lie,[b] and sometimes concurrently with actions for obtaining possession.[c] They also afforded protection for those rights with regard to which possession was not assumed to exist, e. g. for rights of private way.[d] The sphere of interdicts is so extensive, that they were more frequently used by the prætor than were the regular *actiones*. The forty-third book of the Pandects is entirely devoted to the doctrine of interdicts. In general they are either *prohibitoria*, *restitutoria*, or *exhibitoria*; they are also divided into *possessoria* and *non-possessoria*; and are either *judicia simplicia* or *duplicia*.[e]

Under Diocletian and Maximian they approached nearer to the nature of actions, because the magistratus then proceeded even in ordinary suits without appointing a judex; and because only this material distinction remained between them, that in the cases where interdicts were employed the magistrate proceeded somewhat more summarily than in actions.[f] It was a natural result therefore that the proceeding by action should obtain the predominance, and that many of the interdicts should fall into disuse. Those which were retained (§ 251 seqq.) were still applied in the spirit of the old system.

RESTITUTION.

*A. General Principles.**

I. Its Nature.

§ 210. The Roman *restitutio in integrum*, or restoration to the previous condition, was nothing else than the prætor's annulling a transaction

(*a*) fr. 1. pr. fr. 2. §. 1. D. 43. 1.
(*b*) Interdicta retinendæ et recuperandæ possessionis.
(*c*) Interdicta adipiscendæ possessionis.
(*d*) fr. 2. § 2. D. eodem.
(*e*) fr. 2. pr. D. eod.—*Mühlenbruck*, Doctr. Pand. § 155 note 7.
(*f*) § 8. J. 4. 15.—const. 3. 4. C. 8. 1.

* The acquisition as well as the loss of rights was generally made to depend on the principles of the jus civile. Cases however occurred where the acquisition and loss of rights, although effected by a transaction valid according to the jus civile, still appeared to be unjust, and where equity seemed to demand a restoration to the former state of things. The common legal remedy (*commune auxilium*), namely actions, did not suffice for such cases; the prætor, therefore, as the organ of *æquitas*, in order to supply the defects of the rule, contrived an extraordinary remedy (*extraordinarium auxilium*) for exceptions to it, viz. the *in integrum restitutio*. The difference therefore between the *restitutio* and *actiones* is, that actions are founded in the *law*, and restitution in *equity*; that actions form the rule, and restitution the exception; and that actions protect rights which we possess, while restitution restores to us rights which we have lost.

which was valid according to the strict letter of the civil law, and placing the parties in their former state, on grounds of equity.

The *restitutio* rests upon the opposition between *jus strictum* and *æquitas;* and hence, according to the Roman law, restitution could be granted only by one of the higher magistrates (*prætor, præses provinciæ,* &c.): at the present day the right to it is to be regarded as belonging to the jurisdiction of every civil magistrate. As respects the competency of the court in each particular case, the court before whom the principal matter is pending, is competent also to decide concerning restitution, whenever it occurs in the suit as an incidental point (e. g. as an exception against the action, or as a prayer against the loss of a term); where the restitution is sought in an independent suit, the *judex domicilii* of the adversary or (when the *restitutio* is directed *in rem*) the *judex rei sitæ* is competent.

At first it was only in the restitution of minors that the prætor made use of a *cognitio extra ordinem*, i. e. examined and decided the cause himself for the sake of despatch, without appointing a judex; but afterwards he extended the *extraordinaria cognitio* to all restitutions, so that for all sorts of restitution there was but one kind of proceeding. In Germany, on the contrary, a distinction is made between *restitutio ordinaria* and *brevi manu*, according as the question of restitution is investigated and decided with or without a previous hearing of the adversary. The latter occurs for the most part incidentally in suits, and on account of innocent neglects of a party. If, for instance, a party seeks to obtain restitution against the lapse of a term, the judge is accustomed to decide at once on the application, without first affording the adversary an opportunity of being heard respecting it. In many of the German states the *clausula generalis* or the "*Etcetera*" of the prætor is extended in practice by the judges and advocates beyond all reasonable bounds: in ordinary cases every ground of equity is held to be sufficient; and restitution is often granted without requiring the slightest proof of the ground alleged. In general, it must be owned that great abuses are practised under cover of restitution; and that in the proceedings, which in Germany are spun out by adjournments to an endless length, restitution occupies too prominent a place. In order to counteract this abuse, the legislatures of some of the states have subjected the use of this remedy to several restrictions. However, in order to obtain restitution against a definitive sentence or any decree of decisive effect (*decretum decisivum*), which is scarcely ever granted *brevi manu*, a strong ground of equity must be adduced and proved. Sickness, unexpected hindrances, and the like, of the party or his advocate, for instance, would be a sufficient ground for granting a *restitutio ex clausula generali.*

An application for restitution cannot be renewed after it has once been denied, except on new grounds of equity: but as long as the restitution is still undecided, every thing must remain *in statu quo;* and even the execution of the sentence is postponed, unless the restitution is evidently sought for the mere purpose of delay.

According to the maxim, *Minima non curat prætor*, the injury sustained must be of sufficient importance; but it is left to the judge to decide what shall be sufficient. The lesion, moreover, must have been suffered from a transaction valid in itself (consequently not from a transaction void in itself, nor from an unlawful act, nor from a mere accident). Again, it must not be founded upon one's own dolus, or (minors excepted) on one's own culpa; and it must, if necessary, be proved. In what the lesion consists—whether in the sustaining of a positive or negative loss, in the surrender of rights, or the assumption of obligations—is immaterial. Restitution, however, does not take place against the lapse of the thirty years' prescription; against a marriage (although it does against espousals); against a sale by auction, at the instance of the fiscus, of its debtor's property; or against the loss of an *actio pœnalis.*

It is proper to remark however, that a distinction is now made between *restitutio in civilibus* and *in criminalibus.* A *restitutio in criminalibus*, i. e. the restoration to his former condition, of an innocent person condemned by a criminal sentence, is either an act of justice (*ex capite justitiæ*) or an act of grace (*ex capite gratiæ*); an instance of the latter kind is given in p. 214 note *b*. Restitutions in civil causes have been divided, according to their origin, into *restitutiones civiles* and *prætoriæ:* among the former are reckoned those cases where a person may lawfully attack a judgment on account of false witnesses, false documents, or false oaths; and according to the German law, also on account of newly discovered evidence (*ex capite novorum*).

Such restitution was granted on the application of a party who had been injured in consequence of the transaction. The original cause for introducing the *in integrum restitutio* is to be found in the great strictness of the *jus civile*;[a] according to which many legal transactions, that could not have been sustained on the universal principles of law, were regarded as valid and efficient, if only the civil form was observed.[b] This caused the prætor to grant an *exceptio* against such a transaction; and where this would not have been sufficient, an *in integrum restitutio*.[c] And for a similar reason the prætor also granted a restitution against injuries which arose from a rigid application of the rules of prescription in the *jus civile*, or from a neglect. Accordingly the *in integrum restitutiones* are principally founded on the prætorian Edict, though they were afterwards extended by the imperial constitutions.[d] Although the reasons for which the *restitutiones* were first

(*a*) Literature: *Sforzia Oddus* de restitutione in integrum. Venice, 1584. Frankfort, 1672.—*Cujacius* ad tit. Dig. de in integrum restitutionibus. In his works. Vol. 1. p. 975 seqq.—*Duareni* Comm. in primam partem Pand. Lib. 4. tit. 1–6. (In his works, p. 74 seqq.)—*Donelli* Comm. jur. civ. Lib. XXI. c. 4–14.—*Dompierre de Jonquières* de restitutionibus in integrum. Leyden, 1767.—*Biener*, Historia jur. civilis de restitut. in integrum. Leipsic, 1779.—*Röder*, de restitut. in integrum. Hildburghausen, 1783.—*Gmelin*, Principia generalia restitutionis in integrum prætoriæ. Tubingen, 1809.—*Glück*, Comm. Vol. 5. § 431–459. Vol. 6. § 460–473.—*Zimmern*, R. G. Vol. 3. § 101–107.—*Burchardi*, Die Lehre von der Wiedereinsetzung in den vorigen Stand. Gottingen, 1831.

(*b*) *Pauli* sent. rec. I. 7. 1. "Integri instituio est *redintegrandæ rei vel causæ actio*."—fr. 1. § 27. D. 48. 18.—fr. 27. D. 48. 19. (Callistratus) "Divi fratres Arruntio Siloni rescripserunt, *non solere præsides provinciarum ea, quæ pronunciaverunt, ipsos rescindere*. Vetinæ quoque Italicensi rescripserunt: suam mutare sententiam neminem posse, idque insolitum esse fieri. Si tamen de se quis mentitus fuerit, vel, cum non haberet probationum instrumenta, quæ postea repererit, pœna afflictus sit: nonnulla extant principalia rescripta, quibus vel pœna eorum minuta est, vel *in integrum restitutio concessa: sed id duntaxat a principibus fieri potest*."—const. 1. C. 9. 51. "Cum salutatus esset a Gentiano et Advento et Opilio Macrino, præfectis prætorio, clarissimis viris: item amicis, et principalibus officiorum, et utriusque ordinis viris, et processisset, oblatus est ei Julianus Licinianus, ab Opilio Ulpiano tunc legato in insulam deportatus; tunc Antoninus Augustus dixit: *Restituo te in integrum provinciæ tuæ; et adjecit: Ut autem scias, quid sit in integrum restituere: honoribus, et ordini tuo, et omnibus ceteris te restituo*."—Hence it is sometimes defined to be a redintegratio causæ jure civili amissæ, or an instauratio negotii.—const. 2. C. 2. 41. "Adolescentiæ tempus non imputari in id quinquennium liberis, cujus præscriptio seram inofficiosi quæstionem moventibus opponi solet, manifeste ante descripsimus. Impleta igitur ætate legitima, non est in integrum restitutio necessaria: quia non *redintegratio amissæ causæ* his datur, sed integra ipsa causa servatur."—const. 2. C. 2. 22. "Eo tempore, quo soror tua auxilio ætatis juvabatur, si patris intestati bonorum possessionem accipere debuit, licet quinque filios superstites habuerit, non tamen ideo minus ad edicti prærogativam pertinet: scilicet si nunc per ætatem beneficium restitutionis largitur."—*Burchardi*, l. c. § 1. 3.—*Höpfner*, Commentar. Edited by A. D. Weber. § 1001. 1003.

(*c*) *Gaius*, IV. 116.—§ 1–5. J. 4. 13. and *Theophilus* thereon.—fr. 1. D. 4. 1. (Ulpianus) "Utilitas hujus tituli (scil. de in integrum restitutionibus) non eget commentatione: ipse enim se ostendit. Nam sub hoc titulo plurifariam *prætor hominibus vel lapsis, vel circumscriptis subvenit*: sive metu, sive calliditate, sive ætate, sive absentia inciderunt in captionem."

(*d*) To the so-called *civil* restitutions, i. e. those which were introduced by imperial ordinances, belong: 1. The restitution against a judgment founded on false testimony or false documents.—fr. 33. D. 42. 1. Cod. 7. 58.—2. The restitution on the ground of newly discovered documents against a judgment founded on oath.—fr. 31. D. 12. 2. (Gaius) "Admonendi sumus, *interdum etiam post jusjurandum exactum permitti constitutionibus principum, ex integro causam agere, si quis nova instrumenta se invenisse dicat*, quibus nunc solis usurus sit. Sed hæ constitutiones tunc videntur locum habere, cum a judice aliquis absolutus fuerit: solent enim sæpe judices in dubiis causis exacto jurejurando, secundum eum judicare qui juraverit. Quod si alias inter ipsos jurejurando transactum sit negotium, non conceditur eandem causam retractare." (Comp. const. 19. C. 2. 4.)—3. The restitu-

established, did not apply to Germany, yet they were adopted in that country, chiefly because a remedy for injuries arising from prescription or from a neglect was found to be useful and even necessary.[a]

II. Requisites of Prætorian Restitution.[b]

§ 211. The general requisites and conditions of a prætorian restitution are: 1. That a party should have suffered some considerable injury[c] in consequence of a transaction or a neglect, and that too without any fault of his own.[d] 2. A just cause of restitution.[e] 3. The impossibility of obtaining relief from the injurious consequences of such transaction or neglect by any other legal remedy. Accordingly, as a general rule, no restitution is granted in cases where the transaction is *void* by the jus civile, or may be rendered *invalid* by raising an objection to it.[f]

tion against the *adition* of an inheritance which has been found to be incumbered with debts that were unknown at the time it was entered upon.—*Schröter*, l. c. p. 151.—*Gaius*, II. 163 in fine.

(*a*) *Wahl* de usu restitutionis in integrum prætoriæ Romanæ in judiciis Germanicis. Gottingen. 1751.—*Klien* in the Archiv Civ. Prax. Vol. 1. No. 16.

(*b*) *Burckardi*, l. c. § 4–11.

(*c*) fr. 7. pr. D. 4. 1. (Marcellus) "Divus Antoninus Marcio Avito prætori de succurrendo ei qui absens rem amiserat, in hanc sententiam rescripsit: Etsi nihil facile mutandum est ex solennibus: tamen ubi æquitas evidens poscit, subveniendum est itaque si citatus non respondit, et ob hoc more pronunciatum est, confestim autem pro tribunali te sedente adiit; existimari potest, *non sua culpa, sed parum exaudita voce præconis defuisse. Ideoque restitui potest.*"—fr. 16. D. 4. 6. (Paulus) "*Non enim negligentibus subvenitur, sed necessitate rerum impeditis.* Totumque istud arbitrio prætoris temperabitur: id est, *ut ita demum restituat, si non negligentia, sed temporis angustia non potuerunt litem contestari.*"—fr. 27. D. ibid. "*Et sive quid amiserit, sive lucratus non sit, restitutio facienda est:* etiamsi non ex bonis quid amissum sit."—fr. 11. § 4. 5. D. 4. 4. (Ulpianus) "*Item non restituetur, qui sobrie rem sum administrans, occasione damni non inconsulte accidentis, sed fato, velit restitui: nec enim eventus damni restitutionem indulget, sed inconsulta facilitas*, et ita Pomponius lib. XXVIII. scripsit. Unde Marcellus apud Julianum notat, si minor sibi servum necessarium comparaverit, mox decesserit: non debere eum restitui: neque enim captus est emendo sibi rem pernecessariam, licet mortalem." § 5. "Si locupleti heres extiterit, et subito hereditas lapsa sit (puta prædia fuerunt, quæ chasmate perierint, insulæ exustæ sunt, servi fugerunt aut decesserunt): Julianus quidem lib. XLVI sic loquitur, quasi possit minor in integrum restitui; Marcellus autem apud Julianum notat, cessare in integrum restitutionem. Neque enim ætatis lubrico captus est adeundo locupletem hereditatem: *et quod fato contigit*, cuivis patrifamilias, quamvis diligentissimo, possit contingere. Sed hæc res adferre potest restitutionem minori, si adiit hereditatem, in qua res erant multæ mortales, vel prædia urbana; ruinosa æs autem alienum grave, quod non prospexit, posse evenire, ut demoriantur mancipia, prædia ruant, vel quod non cito distraxerit hæc, quæ multis casibus obnoxia sunt."—fr. 21. § 6. D. 4. 2.—Minors alone enjoy restitution on account of their own careless acts. fr. 44. D. 4. 4.—*Gaius*, II. 163. IV. 57.

(*d*) fr. 4. D. 4. 1. (Callistratus) "Scio illud a quibusdam observatum, *ne propter satis minimam rem, vel summam, si majori rei, vel summæ præjudicetur, audiatur is, qui in integrum restitui postulat.*"—fr. 9. pr. D. 4. 4. (Ulpianus) "Si ex causa judicati pignora minoris capta sint, et distracta; mox restitutus sit adversus sententiam Præsidis, vel Procuratoris Cæsaris; videndum, an ea revocari debeant, quæ distracta sunt, nam illud certum est, pecuniam ex causa judicati solutam ei restituendam: sed interest ipsius, corpora potius habere; et puto interdum permittendum, id est, *si grande damnum sit minoris.*"—fr. 16. § 4. D. ibid. "Idem Pomponius ait, in pretio emtionis et venditionis naturaliter licere contrahentibus, se circumvenire."—fr. 49. D. ibid. "Si res pupillaris vel adolescentis distracta fuerit, quam lex distrahi non prohibet; venditio quidem valet, verumtamen, si *grande damnum pupilli vel adolescentis versatur*, etiamsi collusio non intercessit, distractio per in integrum restitutionem revocatur." Burchardi's opinion, that the amount of the injury suffered was indifferent, is not supported by any sufficient argument.

(*e*) fr. 1. D. 4. 1. (p. 214. note *b*.)—fr. 2. 3. D. ibid.

(*f*) fr. 16. pr. § 1–4. D. 4. 4.—fr. 1. § 1. D. 4. 3. (Ulpianus) "Verba autem edicti talia sunt: Quæ dolo malo facta esse dicentur, si

III. Proceedings.

§ 212. As restitution is a legal favour (*beneficium juris*), it is granted only on the application of the party entitled.[a] As respects the *mode* in which restitution is to be sought, it may be done: 1. Either directly by an *action*, when the injured party has no opportunity of enforcing his right by way of exception; because, on his part, the transaction has already been performed. In this case a double proceeding took place according to the older Roman law, namely, the so-called *judicium rescindens* and the *judicium rescissorium*. In the former, the question to be decided was, whether the circumstances of the case were such as to entitle the party to the restitution prayed for; and this pre-judicial question the prætor decided by *extraordinaria cognitio*. If the restitution was granted to the plaintiff, his former right and his former *actio* were restored to him, as fully as though they had never been lost; and he could then bring an action against his adversary, under the name of an *actio rescissoria s. restitutoria*. In case he did so, the prætor gave a *judicium*, i. e. he appointed a *judex*; and thus was introduced the ordinary process or the *judicium rescissorium* on the principal cause.[b] By the modern Roman law, these proceedings are united together; and the judge, after hearing both parties (*causa cognita*), pronounces at the same time on the pre-judicial question and on the principal cause itself.[c] 2. Or by way of *exception*, when the injurious transaction has not yet been performed, and an action is brought against the injured party to enforce fulfilment; or when, after the transaction has been performed, the injured party has again come into possession of the thing which he had lost thereby.[d] 3. Or lastly, by *replication* or *duplication*.[e]

de his rebus alia actio non erit, et justa causa esse videbitur, judicium dabo."—fr. 1. § 7. 8. D. ibid. fr. 21. § 3. D. 4. 2. Yet this rule is subject to many exceptions. See const. 3. C. 2. 20.—const. 3. C. 2. 25. "Etiam in his, quæ minorum tutores vel curatores male gessisse probari possunt: *licet personali actione a tutore vel curatore jus suum consequi possint, in integrum tamen restitutionis auxilium eisdem minoribus dari jampridem placuit.*"—Comp. in general *Francke*, Beiträge zur Erläuterung einzelner Rechtsmaterien. No. 1. p. 67.

(*a*) fr. 69. D. 50. 17. (Paulus) "*Invito* beneficium non datur."—fr. 25. § 1. D. 4. 4. (Gaius) "Si talis interveniat juvenis, cui præstanda sit restitutio: *ipso postulante*, præstari debet, aut procuratori ejus, cui id ipsum nominatim mandatum sit: qui vero generale mandatum de universis negotiis gerendis allegat, non debet audiri."—*Burchardi*, l. c. § 23.

(*b*) § 5. J. 4. 6.—fr. 35. pr. in fin. D. 44. 7. —fr. 13. § 1. D. 4. 4.—*Vinnii* Select. quæst. L. 1. c. 10.—*Glück*, Comm. Vol. 5. p. 408. and especially *S. W. Zimmern*, Diss. de judicio, quod vocant rescindente ac rescissorio. Heidelberg, 1826. (Reviewed by *Huschke* in the Tub. krit. Z. Vol. 2. p. 163.) —*Burchardi*, l. c. § 24. 25.—*Schröter*, l. c. p. 104.—Mackeldey seems to have entertained the opinion that in all cases a separation of the judicium *rescindens* and *rescissorium* was necessary. But this view has been rejected by nearly all modern civilians. See *Höpfner*, Comm. § 1002. The prætor, as Dr. Rosshirt observes, either investigated and decided the question of restitution itself (cognitio prætoria), or gave a provisional decree for the restitution, in like manner as he did in the case of the interdicts, and reserved the more minute examination for the principal question in the suit. *Mühlenbruch*, Doctrina Pand. § 161.

(*c*) *Eschenbach*, Diss. de restit. in integrum quæ fit brevi manu. Bützow, 1778; and in his Comm. jur. Fasc. 1. Rostock, 1788. No. 1.—*Burchardi*, l. c. § 26.

(*d*) fr. 9. § 3. D. 4. 2.

(*e*) fr. 9. § 4. D. 12. 2.

IV. Its Duration.[a]

§ 213. The duration of the term within which restitution must be sought, is different according to the different ways in which it may be effected. 1. If the restitution is sought by way of an *action*[b] or *replication*,[c] it must now be done, as a general rule, within four years. With minors this term begins to run from the time they attain their majority; but with those who are already of age, it begins at the time when they obtain a knowledge of the injury and have it in their power to institute the action.[d] 2. But if it be sought by way of *exception* or *duplication*, it is, like these themselves, not restricted to any term.[e]

V. Its Effect.

§ 214. The general effect of granting a restitution is, that every thing, as far as possible, must be restored to the condition in which it

(*a*) *Glück* de vita petendæ restitutionis in integrum prætoriæ: in his Opusc. Fasc. 2. p. 259. Fasc. 4. p. 1.—*Koch* de præscriptione restitutionis in integrum. Giessen, 1780.—*Thibaut*, Verjährung. § 49.—*Unterholzner*, Verj. Vol. 2. p. 1–20.—*Burchardi*, l. c. § 27.—*Schröter*, Comm. de temporibus in integrum restitutionum. Jena, 1834.

(*b*) According to the older law, all actions for restitution (those only excepted which took place on account of capitis deminutio and metus, both of which were judicia perpetua) were to be instituted intra annum utilem fr. 1. § 1. D. 4. 6.—fr. 19. 39. pr. D. 4. 4.—fr. 1. pr. fr. 10. pr. § 18. D. 42. 8.—By the later ordinances of Constantine and Justinian, instead of the annus utilis, a biennium continuum was granted within which the actio de dolo malo might be brought (const. un. C. Theod. 2. 15.—const. 8. C. 2. 21.), and a quadriennium continuum for restitution on account of minor ætas and absentia, const. 2. pr. C. Theod. 2. 16.—const. 7. C. 2. 53. "Supervacuam differentiam utilis anni in integrum restitutionis a nostra republica separantes, sancimus, et in antiqua Roma et in hac alma urbe, et in Italia, et in aliis provinciis *quadriennium continuum tantummodo numerari ex die, ex quo annus utilis currebat, et id tempus totis locis esse commune*; ex differentia enim locorum aliquod induci discrimen, satis nobis absurdum visum est. *Quod non solum in minorum restitutionibus* (quibus utilis annus incipit currere, ex quo vicesimi sexti anni dies illuxerit) *sed etiam in majorum hoc idem adhiberi sancimus: ut et hic pro utili anno memorata continuatio temporis observetur ad interponendam contestationem finiendamque litem.* § 1. Et quemadmodum omnis minor ætas excipitur in minorum restitutionibus; ita et in majorum, tempus in quo reip. causa abfuerint, vel aliis legitimis causis quæ veteribus legibus enumeratæ sunt, fuerint occupati, omne excipiatur: et non absimilis sit in hac parte minorum et majorum restitutio."—The const. last quoted is now extended *to all* restitutions where the party is of age, with the single exception of the actio de dolo malo. This extension indeed is not supported by the theory of the law, but it has been adopted by a general and uniform practice. *Glück*, Comm. Vol. 5. § 439.—*Unterholzner*, l. c. p. 5.—*Burchardi*, l. c. p. 509.—*Thibaut*, System des Pandekten-Rechts. § 1036.

(*c*) fr. 9. § 4. D. 12. 2.—*Weber*, Beitr. zur Lehre von den Klagen u. Einreden. No. 1. p. 12.

(*d*) const. 7. pr. C. 2. 53.—const. 8. C. 2. 21.—const. 4. C. 2. 20.—*Kind*, Quæst. for. (2d Ed.) Vol. 3. c. 103. Many jurists have erroneously supposed that the prescription did not commence until the injured party had obtained a knowledge of the injury suffered. *Burchardi*, l. c. p. 517. But it is only with regard to churches and charitable institutions, that the canon law prescribes that the time shall not begin to run until the supervisor has been informed of the injury. c. 1. 2. in 6to. 1. 21.—Clem. un. 1. 11.

(*e*) fr. 5. § 6. D. 44. 4.—const. 5. C. 8. 36.—*Koch*, l. c. § 4–8.—*Weber*, Von der nat. Verb. § 92. Another opinion is advanced by *Pfeiffer*, Prakt. Ausf. Vol. 3. p. 73. Mackeldey's opinion, that exceptions are not limited by prescription, is correct, as a *rule*; but (as Rosshirt observes) there must be an exception with respect to the exceptio restitutionis, because the right of restitution is only recognised where it is exercised in due time. Thus Rosshirt has abandoned his former opinion as stated in his Lehrb. d. Gem. Deutsch. Civilr. § 66. (See the Editor's note, p. 205.) The view which he has now adopted seems to be supported not only by the nature and purpose of the restitution and by equity, but also by the fact, that the term of restitution is a limitation of time introduced as a singularity, and that a jus singulare cannot be subjected to rules derived from a general law, for then it would lose its peculiar character.

was before the transaction. Consequently, 1. Each party must return what he has received from the other, together with all the accessions and fruits, in so far as these latter are not counterbalanced by the interest on the money to be returned to himself;[a] and each must repay the other the necessary and useful expenditures which he has made upon the thing during his possession of it (§ 155).[b] 2. When restitution of a right is granted, the party entitled recovers thereby all that he had lost or surrendered; and if he had bound himself to any performance, he is now freed from such obligation.[c]

VI. Parties to Restitution.[d]

§ 215. 1. The benefit of restitution is not confined to the injured party himself; for his heirs,[e] assignees,[f] and sureties,[g] may also avail themselves of it.[h] 2. But in general it can be claimed only against the

(*a*) fr. 24. § 4. D. 4. 4.—const. un. pr. C. 2. 48. "Qui restituitur in integrum, sicut in damno morari non debet, ita nec in lucro: et ideo *quicquid ad eum pervenit, vel ex emtione, vel ex venditione vel ex alio contractu, hoc debet restituere.*"—Comp. fr. 23. § 2. fr. 28. § 6. D. 4. 6.—fr. 27. § 1. fr. 40. § 1. D. 4. 4.—*Burchardi*, l. c. § 29. 30.

(*b*) fr. 39. § 1. D. 4. 4.

(*c*) const. un. § 1. 2. C. 2. 48. "Sed et si intercessor minor viginti quinque annis intervenerit, *in veterem debitorem debet restitui actio.* § 2. Sed et cum minor adiit hereditatem, et restituitur: mox quicquid ad eum ex hereditate pervenit, debet præstare; verum et si quid dolo ejus factum est, hoc eum præstare convenit."—Comp. const. 2. C. 2. 40. "Ad bonorum possessionem in paternis rebus omissam minores in integrum restitutionis admitti beneficio jam pridem placuit. *Restituti autem decreto, bona quæ habuerunt mortis tempore patris, debent conferre fratribus.*"—const. 8. C. 2. 22. "*Minoribus in his quæ vel prætermiserunt, vel ignoraverunt, innumeris auctoritatibus constat esse consultum.*"

(*d*) *Burchardi*, l. c. § 22.

(*e*) fr. 6. D. 4. 1.—fr. 18. § 5. D. 4. 4. But it must be here understood that the testator has not made a valid renunciation of it, and that the term of restitution has not yet expired, as the heir enjoys only what remains of the term at the testator's death. fr. 19. D. 4. 4.

(*f*) fr. 24. pr. D. 4. 4.—fr. 14. § 2. D. 4. 2.

(*g*) fr. 7. § 1. D. 44. 1. (Paulus) "*Rei autem cohærentes exceptiones etiam fidejussoribus competunt:* ut rei judicatæ, dolo mali, jurisjurandi, quod metus causa factum est. Igitur et si reus pactus sit in rem, omnimodo competit exceptio fidejussori. Intercessionis quoque exceptio, item quod libertatis onerandæ causa petitur, etiam fidejussori competit. Idem dicitur, et si pro filiofamilias contra Senatus consultum quis fidejusserit, aut pro minore viginti quinque annis circumscripto. Quod si deceptus non sit in re, tunc nec ipse ante habet auxilium, quam restitutus fuerit, nec fidejussori danda est exceptio."—Except in the case when the surety was given directly with a view to secure the creditor against the debtor's beneficium restitutionis. fr. 19. D. ibid.—fr. 9. § 3. D. 14. 6.—fr. 13. pr. D. 4. 4.—const. 2. C. 2. 24. "Si ea, quæ tibi vendidit possessiones interposito decreto Præsidis, ætatis tantummodo auxilio juvatur: *non est dubium, fidejussorem ex persona sua obnoxium esse contractui.* Verum si dolo malo apparuerit contractum interpositum esse; manifesti juris est, utrique personæ, tam venditricis, quam fidejussoris consulendum esse."—*Weber*, Von der nat. Verb. § 113. He who has become surety for a minor enjoys the restitution only when he himself is a minor, or when a *causa specialis* entitles him to it. This will be seen from fr. 95. § 3. D. 46. 3.—fr. 7. § 1. D. 44. 1. which is often referred to in support of a contrary opinion, has no relation to this question.

(*h*) fr. 14. § 2. D. 4. 2.—const. 5. § 1–3. C. 2. 53. "Si quando sane in minoris jura successerit minor: *minime prohibeatur*, cum quintum et vicesimum suæ ætatis annum transierit, *in integrum restitutionis beneficio uti tempore illibato.* § 2. Quod si majoris fuerit minor jura nactus, quantum ad eas pertinet causas, quas ex persona majoris fuerit consecutus: *tantum temporis ad exponendas in integrum restitutiones, decidendasque causas accipere debebit, quantum defuncto, cujus heres aut bonorum possessor docebitur extitisse, reliquum fuerat.* § 3. Cum vero major successionem fuerit adeptus minoris: si quidem civili jure ab intestato, vel ex testamento successerit, mox cum fuerit adita hereditas; si vero honorario jure, ex quo bonorum possessio fuerit accepta, examinando ac terminando in integrum restitutionis negotio, solida sine ulla diminutione tempora supputentur."

opposite party to the transaction or his heirs, and not against a third possessor of the thing; excepting when the action of restitution is brought for the restoration of an *actio in rem scripta*[a] or of a real right.[b]

B. Causes of Restitution.[c]

The prætorian restitution was founded either on a cause *expressly named* in the Edict,[d] or on the *general clause* appended by the prætor to the Edict respecting restitution on account of absence: "*Item si qua alia mihi justa causa esse videbitur, in integrum restituam.*"[e]

I. Restitution for Special Causes.

A. Because of Force.[f]

§ 216. When a person had been compelled by unlawful force, or by fear that was not groundless, to engage in a transaction injurious to himself, he was entitled to pray for restitution on that account, against a transaction which would have been valid according to the strict letter of the law, notwithstanding the compulsion employed.[g] The results of an application for restitution in such a case were as follows: 1. The prætor restored to the injured party the action that arose out of the lost

(*a*) fr. 9. § 8. D. 4. 2.
(*b*) § 5. J. 4. 6.
(*c*) Dig. 4. tit. 1–7.—Cod. 2. tit. 20–55.
(*d*) fr. 1. 2. D. 4. 1. "Prætor hominibus vel lapsis vel circumscriptis subvenit: sive *metu*, sive *calliditate*, sive *ætate*, sive *absentia*, inciderunt in captionem, sive per *status mutationem*, aut *justum errorem*."
(*e*) fr. 1. § 1. D. 4. 6. (Ulpianus) "Verba autem edicti talia sunt: Si cujus quid de bonis, cum is metu, aut sine dolo malo, reipublicæ causa abesset, inve vinculis, servitute, hostiumque potestate esset: posteave cujus actionis eorum cui dies exisse dicetur; item, si quis quid usu suum fecisset, aut, quod non utendo amissum sit, consecutus; actioneve qua solutus ob id, quod dies ejus exierit, cum absens non defenderetur, inve vinculis esset, secumve agendi potestatem non faceret: aut cum eum invitum in jus vocari non liceret, neque defenderetur: cumve magistratus de ea re appellatus esset, sive cui per magistratus factum, sine dolo ipsius actio exemta esse dicetur: earum rerum actionem intra annum, quo primum de ea re experiundi potestas erit. *Item si qua alia mihi justa causa esse videbitur, in integrum restituam*: quod ejus per leges, plebiscita, senatusconsulta, edicta, decreta principum licebit."—fr. 26. § 9. D. ibid." Item, inquit prætor: *si qua alia mihi justa causa videbitur, in integrum restituam*. Hæc clausula edicto inserta est necessario; multi enim casus evenire potuerunt, qui deferrent restitutionis auxilium, nec singulatim enumerari potuerunt: ut quoties æquitas restitutionem suggerit, ad hanc clausulam erit descendendum, utputa legatione quis pro civitate functus est, æquissimum est eum restitui, licet reipublicæ causa non abiit: et sæpissime constitutum est, adjuvari eum debere, sive habuit procuratorem, sive non. Idem puto et si testimonii causa sit evocatus quis ex qualibet provincia, vel in urbem, vel ad principem: nam et et hic sæpissime est rescriptum subveniri. Sed et his, qui cognitionis gratia, vel appellationis peregrinati sunt, similiter subvenitur. Et generaliter quotiescunque quis ex necessitate non ex voluntate abfuit: dici oportet, ei subveniendum."
(*f*) Dig. 4. 2.—Dig. 44. 4.—Cod. 2. 20.—Tit. X. 1. 40.—*Donelli* Comm. jur. civ. lib. 15. c. 40. —*Walch* de negotiis et actibus vi metuve exortis ex jure Romano partim ipso jure nullis, partim a prætore rescindendis. Jena, 1790.—*Breusing* in Siebenkees's jurist. Mag. Vol. 2. p. 156.—*Klien*, l. c. p. 221–229.—*Werner*, Von der Verbindlichkeit des erzwungenen Willens. Frankfort, 1817.—*Glück*, Comm. Vol. 2. § 444.—*Zimmern*, R. G. Vol. 3. § 102.—*Tiennes* de eo quod metus causa gestum erit jure Romano. Louvain. 1824.—*Burchardi*, l. c. § 18. 19.—*Schröter* in the Z. f. Civ. R. u. Proc. Vol. 6. p. 116–120.
(*g*) fr. 1. D. 4. 2.—Comp. fr. 3. § 1. fr. 7. fr. 8. § 3. D. ibid.—fr. 21. pr. D. ibid. "Si mulier contra patronum suum ingrata facta, sciens se ingratam, cum de suo statu periclitabatur, aliquid patrono dederit, vel promiserit, ne in servitutem redigatur: *cessat edictum, quia hunc sibi metum ipsa infert*."—const. 9. C. 2. 20.

right, and gave it to him as an *actio utilis*, as though he had never lost it. This action so restored was called an *actio rescissoria s. restitutoria*, and was, according to the nature of the restored right, either a real or a personal action.[a] 2. The prætor also granted the injured party a new special action, namely, the *actio quod metus causa*,[b] for the delivery of the thing together with all belonging to it,[c] not only against the person who had employed the unlawful force,[d] but also against a third possessor of the thing, even though innocent,[e] and against the heirs of the party who had used the force, in so far as they were enriched thereby.[f] 3. Lastly, the injured party, according to the circumstances, could defend himself with the *exceptio quod metus causa*, against any one who brought a suit against him founded on the compulsory transaction, or who sued him by the *vindicatio* for the thing obtained from him by force.[g] As according to the modern law, a transaction concluded under illegal constraint is invalid *ipso jure*, when the party who has been compelled is not willing to let it stand, there is no need of restitution against it; still this *actio quod metus causa* may be of use even at the present day, so far as it is an *actio in rem scripta*, and may be employed where no other legal remedy exists; and in so far as it is an *actio rei persecutoria*, it survives unconditionally against the heirs of the party. As it is not, properly speaking, an action of restitution, it is not lost by limitation before the expiration of thirty years.[h]

(*a*) fr. 9. § 4–8. D. 4. 2. (Ulpianus) "*Volenti autem datur et in rem actio, et in personam, rescissa acceptilatione, vel alia liberatione.* § 5. Julianus lib. III Digestorum putat eum, cui res metus causa tradita est, non solum reddere, verum et de dolo repromittere debere. § 6. *Licet tamen in rem actionem dandam* existimemus, quia res in bonis est ejus, qui vim passus est; verum non sine ratione dicetur, si in quadruplum quis egerit, finiri in rem actionem, vel contra. § 7. Ex hoc edicto restitutio facienda est, in integrum officio judicis, id est ut, si per vim res tradita sit, retradatur, et de dolo (sicut dictum est) repromittatur, ne forte deterior res sit facta. Et, si acceptilatione liberatio intervenerit, *restituenda erit in pristinum statum obligatio*: usque adeo, ut Julianus scribat lib. IV Digestorum, si pecunia debita fuit, quæ accepta per vim facta sit, nisi vel solvatur, vel restituta obligatione judicium accipiatur, quadruplo eum condemnandum. Sed et si per vim stipulanti promisero, stipulatio accepto facienda erit. Sed et si ususfructus vel servitutes amissæ sint, restituendæ erunt."—const. 3. C. 2. 20.

(*b*) fr. 9. § 4. 6. fr. 14. § 5. D. ibid.

(*c*) fr. 12. pr. D. 4. 2. (Idem) "*Sed et partus ancillarum, et fœtus pecorum, et fructus restitui, et omnem causam oportet*; nec solum eos, qui percepti sunt, verum si plus ego percipere potui, et per metum impeditus sum, hoc quoque præstabitur."

(*d*) It may be brought against him, even though he is no longer in possession of the thing obtained by force.—fr. 14. § 5. D. ibid.

(*e*) fr. 14. § 3. 5. fr. 9. § 6. 8. D. ibid.

(*f*) fr. 16. § 2. D. ibid. (Ulpianus) "Hæc actio heredi, ceterisque successoribus datur; quoniam rei habet persecutionem. *In heredem autem, et ceteros in id, quod pervenit ad eos, datur non immerito*, licet enim pœna ad heredem non transeat, attamen quod turpiter, vel scelere quæsitum est (ut et est rescriptum) ad compendium heredis non debet pertinere." Comp. const. un. C. 4. 17.—The action may also be instituted by a third person whose interests are in any way injured by the force applied to another. fr. 14. § 6. 8. D. 4. 2. (Idem) "Labeo ait, si quis per metum reus sit constitutus, et fidejussorem volentem dederit: et ipse et *fidejussor liberatur*. Si solus fidejussor metu accessit, non etiam reus, solus fidejussor liberabitur. § 8. Si quis per vim sisti promittendo, postea fidejussorem adhibeat. *is quoque liberatur*." Comp. fr. 7. § 1. D. 44. 1.

(*g*) § 1. J. 4. 13.—fr. 9. § 3. D. 4. 2.—const. 5. C. 8. 39. "Dolo vel metu adhibito, actio quidem nascitur, si subdita stipulatio sit: *per doli mali tamen vel metus exceptionem summoveri petitio debet*."—const. 5. C. 8. 36. Comp. also fr. 4. § 33. D. 44. 4.

(*h*) Of late the question has arisen whether the action (metus vel doli) can be regarded as a true restitution or not, when it is brought not

B. Because of Fraud.[a]

§ 217. If a person had been misled by fraud into a transaction which, notwithstanding the fraud, would have been valid according to the jus civile, no *actio restitutoria* took place, as in the case of *vis et metus;* i. e. the lost action was not restored. The defrauded party, however, had the following remedies: 1. He could obtain restitution by means of the *exceptio* or *replicatio doli*,[b] to which he was entitled not only against the defrauder, but likewise against any third party who had acquired the thing of which he had been fraudulently deprived, whether such party had acquired it in a lucrative manner (*titulo gratuito*), or whether, in case of onerous acquisition (*titulo oneroso*), he was *in mala fide.*[c] 2. But when the defrauded person was not in a condition to make use of the *exceptio doli*, and had no other legal remedy, the prætor granted him the *actio de dolo malo*, against the defrauder and his heirs who had been enriched by the fraud,[d] for the restitution of the thing of which he had been fraudulently deprived, with all its accessions; and where this was not practicable, he was allowed to sue for compensation in damages (*id quod interest*), the amount of which was to be ascertained from his own statement under oath, and, if necessary, to be abated by the judge.[e] This *actio de dolo malo* was, however, as an *actio famosa*, subjected by the Roman law to many restrictions;[f] and in those cases

to annul the transaction (restitutio *naturalis*), but to secure the payment of the *id quod interest* (restitutio *juridica*). In such case, it seems, the question is to be answered in the negative.

(*a*) Dig. 4. 3. Dig. 44. 4.—Cod. 2. 21.—*Glück*, Comm. Vol. 5. § 452.—*Zimmern*, R. G. Vol. 3. § 103.—*Hänel* in the Archiv Civ. Prax. Vol. 12. p. 408.—*Burchardi*, l. c. § 18–20.—*Schröter*, l. c. p. 123.

(*b*) fr. 1. § 1. fr. 2. pr. D. 44. 4. (Paulus) "*Ideo autem hanc exceptionem (doli mali) prætor proposuit, ne cui dolus suus per occasionem* juris civilis contra naturalem æquitatem prosit."—fr. 2. pr. D. ibid. (Ulpianus) "Palam est autem, *hanc exceptionem ex eadem causa propositam, ex qua causa proposita est de dolo malo actio.*"—*Zimmern* de judicio resc. p. 8.—*Huschke* in the Tüb. krit. Z. Vol. 2. p. 168.—*Francke*, Beiträge. No. 1. p. 66.

(*c*) fr. 4. § 27–32. D. 44 4.

(*d*) fr. 1. pr. § 1. D. 4. 3. (Ulpianus) "*Hoc edicto prætor adversus varios et dolosos, qui aliis offuerunt calliditate quadam, subvenit;* ne vel illis malitia sua sit lucrosa, vel istis simplicitas damnosa." (§ 1. see p. 215. note *f.* in fin.)—fr. 17. § 1. D. 4. 3. (Idem) "*Hæc actio in heredem, et ceteros successores datur, duntaxat de eo, quod ad eos pervenit.*"—fr. 26. D. ibid. (Gaius) "*In heredem eatenus daturum se eam actionem proconsul pollicetur, quatenus ad eum pervenerit,* id est quatenus ex ea re locupletior ad eum hereditas venerit."—Comp. § 1. J. 4. 12.—But it could not be brought against a third possessor of the thing. const. 10. C. 4. 44.—*Martin*, Rechtsgutachten. Vol. 1. No. 7.—*Reinhardt*, Verm. Aufs. No. 1. Art. 15.

(*e*) fr. 18. pr. D. 4. 3. (Paulus) "Arbitrio judicis in hac quoque actione restitutio comprehenditur: et, *nisi fiat restitutio, sequitur condemnatio, quanti ea res est.* Ideo autem et hic, et in metus causa actione certa quantitas non adjicitur; *ut possit per contumaciam suam tanti reus condemnari, quanti actor in litem juraverit: sed officio judicis debet in utraque actione, taxatione juris jurandum refrenari.*"—fr. 2. D. 12. 3. (Idem) "Sive nostrum quid petamus, sive ad exhibendum agatur. § 1. Interdum quod intersit agentis, solum æstimatur, veluti cum culpa non restituentis, vel non exhibentis punitur: *cum vero dolus, aut contumacia non restituentis, vel non exhibentis, quanti in litem juraverit actor.*"—fr. 5. § 3. D. ibid.

(*f*) These restrictions related to the *limitation* of this action (const. 8. C. 2. 21.); to the *persons* against whom it might be brought (fr. 11. § 1. D. 4. 3.—const. 5. C. 2. 21.—*Spiering* ad L. 5. C. de dolo malo. Leyden, 1808.); and to the amount of *damages* which might be recovered by it. (fr. 9. § 5. fr. 10. D. 4. 3.). Comp. also fr. 5. D. ibid.—fr. 38. D. ibid. (Ulpianus) "Quidam debitor epistolam quasi a Titio mitti creditori suo effecit, ut ipse liberaretur; hac epistola creditor deceptus, Aquiliana stipulatione, et accepti latione liberavit debitorem: postea epistola falsa, vel inani

where it could not be employed, an *actio in factum* was allowed, when the party had no other legal means of redress.[a] In Germany a transaction founded in fraud is invalid of itself, and the party who is injured by the fraud may bring his suit against the defrauding party in order to have the agreement rescinded, and also to recover damages (*id quod interest*), by means of the *actio ex contractu*; the *actio de dolo malo* is therefore of use only where a transaction has been occasioned by the fraud of a third person,[b] or where the fraud of the opposite party to the contract had reference merely to non-essentials (*dolus incidens*).

C. *Because of Minority.*[c]

1. General Principle.

§ 218. Whenever a minor, by which is here meant every one who is not full five and twenty years old,[d] has suffered an injury either by a transaction which in strict law would be binding upon him, or by the omission of an act, he can usually seek restitution, and that simply for the reason that at the time of performing or omitting to perform the act he was yet a minor.[e] Herein consists the legal benefit of minority, or the so-called *jura minorum*.

2. Parties to such Restitution.

§ 219. 1. As a general rule, all minors are entitled to this benefit, with regard to all legal transactions or omissions by which they have suffered an injury.[f] This rule, however, does not apply to the following cases: viz. when a minor with an evil intent has represented himself as of age;[g] when he has been declared of age by the

reperta, *creditor major quidem annis viginti quinque de dolo habebit actionem; minor autem in integrum restituetur.*"

(*a*) fr. 11. in fin. fr. 12. D. ibid. "Ne ex dolo suo lucrentur."—fr. 28. fr. 29. ibid.

(*b*) fr. 18. § 3. ibid.

(*c*) *Gaius*, IV. 57. in fin.—*Paulus*, I. 9.—Cod. Theod. II. 16.—Cod. II. 22. 25.—*Donelli* Comm. jur. civ. lib. XXI. c. 6–13.—*Hedemann*, Diss. de auxilio quod ætati impertitur sive de restitutione minorum. Gottingen, 1751.—*Glück*, Comm. Vol. 5. § 456.—*Zimmern*, R. G. Vol. 1. § 237. Vol. 3. § 104.—*Burchardi*, l. c. § 13–15.

(*d*) In regard to the beneficium restitutionis, the age of a minor is to be counted according to the *naturalis* computatio; that is to say, one is considered to be a minor, until he has completed his 25th year to the last minute.

(*e*) fr. 1. pr. § 1. 2. fr. 3. D. 4. 4.—const. 5. pr. C. 2. 22.—const. 2. C. 2. 25.—const. 11. C. 5. 71. "Si quidem sine decreto minor annis patronus tuus rusticum prædium venundedit: supervacuum est de vili pretio tractare, cum senatusconsulti auctoritas retento dominio alienandi viam obstruxerit. *Si vero jure interposito decreto venditionem vili pretio ejus possessionis, cujus vires ignorabat, fecit, juxta perpetui edicti auctoritatem in integrum restitutio, causa tamen cognita præbetur.*" The restitution takes place even though the loss should have been caused by the minor's own indiscretion, fr. 44. D. 4. 4; or by the fault of his tutor or curator, fr. 29. pr. fr. 47. D. 4. 4. const. 3. C. 2. 25.; or though the transaction should have been confirmed by a court, const. 2. C. ibid.—fr. 4. D. 42. 1.

(*f*) fr. 3. § 4. D. 4. 4.—*Gaius*, IV. 57. "Exceptis minoribus XXV annorum; nam hujus ætatis hominibus in omnibus rebus lapsis prætor succurrit."

(*g*) const. 1–3. C. 2. 43. "Si cum minor annis XXV esses, tabulis, quæ sunt tuarum professionum, oblatis tibi, ætatem quasi major annis viginti quinque *decepta* probasti: in integrum restitutionem intra statutum legibus tempus, etiam post impletam ætatem, de omnibus intra eam ætatem adversus te gestis, postulare apud eum, cui de ea re jurisdictio est, potes." const. 2. "Si is, qui mino-

prince;[a] when he has been injured in a business or trade which he was publicly authorized to carry on;[b] when after coming of age he has either expressly or tacitly approved of the transaction,[c] or has confirmed it with an oath;[d] when the transaction was concluded not by himself but by his testator who was of age;[e] when the minor has given away something, which propriety required of him to do;[f] when, after a *decretum de solvendo*, a payment has been made to himself or to his guardian;[g] and lastly, there is no restitution against a promise of marriage or on account of a delict.[h]

2. The legal benefit of minors extends also to their heirs and *cessionarii* (assignees), even though these should be of age;[i] but not, as a rule,

rem nunc se esse adseverat, fallaci majoris ætatis mendacio te deceperit, cum juxta statuta juris errantibus, *non etiam fallentibus minoribus* publica jura subveniant, *in integrum restitui non debet.*" const. 3. "*Si alterius circumveniendi causa minori ætate majorem te probare aspectu laboraveris: cum malitia suppleat ætatem, restitutionis auxilium tam sacris constitutionibus, quam rescriptorum auctoritate denegari statutum est.* Quod si per injuriam, vel circumventionem adversarii hoc fuerit factum: durabit beneficium, quo minoribus causa cognita subveniri solet. Aditus itaque Præses provinciæ, probationis ætatis examinata causa: si tuum dolum non repererit intercessisse, ac te minorem tunc fuisse probaveris: causa cognita in integrum restitui providebit. Si tamen in instrumento, per sacramenti religionem, majorem te esse adseverasti: non ignorare debes, *exclusum tibi esse in integrum restitutionis beneficium*, nisi palam et evidenter ex instrumentorum probatione, non per testium depositiones, te fuisse minorem ostenderis. Hujus modi autem sacramento corporaliter præstito nullum tibi superesse auxilium, perspicui juris est."—*Gottschalk*, Discept. forens. Vol. 1. cap. 9.

(*a*) const. 1. C. 2. 45. "*Eos qui veniam ætatis* (a principali clementia) *impetraverunt*, etiamsi minus idonee rem suam administrare videantur, *in integrum restitutionis auxilium impetrare non posse*, manifestissimum est: ne hi, qui cum eis contrahunt, principali auctoritate circumscripti esse videantur."—*Cremer*, Explicatio leg. 1. C. de his qui veniam ætatis impetraverunt. Groningen, 1808.

(*b*) *Weber*, Von der nat. Verb. § 64. note 7.

(*c*) const. 1. 2. C. 2. 46. "Si inter minores quinque et viginti annis vel scriptura interposita, vel sine scriptura facta sine dolo divisio est, *eamque post legitimam ætatem ratam fecerint: manere integram debere convenit.*" const. 2. "*Qui post vicesimum quintum annum ætatis ea, quæ in minore ætate gesta sunt, rata habuerint, frustra rescissionem eorum postulant.*"—fr. 3. § 2. D. 4. 4. (Ulpianus) "Scio etiam illud aliquando incidisse: minor viginti quinque annis miscuerat se paternæ hereditati, *majorque factus exegerat aliquid a debitoribus paternis*; mox desiderabat restitui in integrum, quo magis abstineret paterna hereditate; *contradicebatur ei, quasi major factus comprobasset, quod minori sibi placuisset: putavimus tamen restituendum in integrum, initio inspecto.* Idem puto et si alienam adiit hereditatem."

(*d*) Auth. *Sacramenta puberum*, C. 2. 28. This Auth. Frid. is to be found more complete in II. F. 53. § 3. See respecting it: *Weber*, Von der nat. Verb. § 119.—*Quistorp*, Beitr. zur Erläut. versch. Rechtsmaterien. No. 24.—*Bülow*, Abh. Vol. 1. No. 13.—*Savigny*, R. R. im M. A. Vol. 4. p. 162.—*Pfeiffer*, Pract. Ausf. Vol. 3. p. 169.—*Burchardi*, l. c. p. 246.

(*e*) fr. 38. D. 4. 4.—const. 2. C. 2. 28. "In integrum restitutione minoribus adversus commentitias venditiones, et adversus tutorum seu curatorum insidias, sanctionum præsidio cautum esse non dubium est."

(*f*) fr. 9. § 1. D. 4. 4. (Ulpianus). "In dotis quoque modo mulieri subvenitur, *si ultra vires patrimonii, vel totum patrimonium circumscripta in dotem dederit.*"—const. 1. C. 2. 30. "Si quæ res ante nuptias congruenti moderatione a minore annis viginti quinque marito sponsaliorum tempore, etiam curatore præsente, tibi donatæ sunt; *obtentu ætatis non revocabuntur.*"

(*g*) const. 25. C. 5. 37.

(*h*) fr. 9. § 2. D. 4. 4. (Ulpianus) "Nunc videndum, minoribus utrum in contractibus captis duntaxat subveniatur, an etiam delinquentibus: utputa dolo aliquid minor fecit in re deposita, vel commodata, vel alias in contractu; an ei subveniatur, si nihil ad eum pervenit? Et placet, *in delictis minoribus non subveniri*; nec hic itaque subvenietur."—cap. 9. X. 4. 2. "De illis, qui in minori ætate desponsantur, respondemus, quod si ita fuerint ætati proximi, quod potuerint copula carnali conjungi, *minoris ætatis intuitu separari non debent*, si unus in alium visus fuerit consensisse, cum in eis ætatem supplevisse malitia videtur, sed cujuscunque sint ætatis, se possunt per illatam violentiam excusare, nisi post violentiam consensus accedat."—*Böhmer*, Exercitt. ad Pand. Vol. 2. No. 34.—*Bülow* and *Hagemann*, Pract. Erört. Vol. 4. No. 66.

(*i*) fr. 18. § 5. D. 4. 4.—fr. 24. pr. D. ibid.

to a surety who knowingly became responsible for the minor.[a] It is allowed to a third party only in the case where his interest is indivisibly connected with that of the minor.[b]

3. The restitution on account of *minor ætas*, can be sought only against the party with whom the minor has concluded the injurious transaction,[c] and against the heirs of such party;[d] and not, as a general rule, against a third possessor of the thing lost by the transaction,[e] or against the parents of a minor where the transaction is between the parents and the minor.[f]

3. Its Effect and Duration.

§ 220. The effect of this restitution is, that every thing is restored to its former condition.[g] Consequently the minor receives back again what he lost; but he has to account for what he received from the opposite party no further than as he is still enriched thereby, at the time of the litiscontestation.[h] The right of seeking a *restitutio in integrum* remains with the minor four years after he has attained his ma-

(*a*) fr. 13. pr. D. ibid.—fr. 7. § 1. D. 44. 1.—const. 1. C. 2. 24. "Postquam in integrum ætatis beneficio restitutus es, periculum evictionis emtori, cui prædium ex bonis paternis vendidisti, præstare non cogeris. *Sed ea res fidejussores, qui pro te intervenerunt, excusare non potest.* Quare mandati judicio, si pecuniam solverint, aut condemnati fuerint, convenieris: modo si eo quoque nomine restitutionis auxilio non juvaberis."—*Niehaus*, Diss. de fidejussore minoris. Gottingen, 1778. § 14.

(*b*) Arg. fr. 10. pr. D. 8. 6.—fr. 72. pr. D. 45. 1.—fr. 23. 24. D. 4. 4.—*Blaucl*, Diss. de restitutione in integrum minorum ex causa individua majoribus proficua. Gottingen, 1779. This is of importance, e. g. in the cases of the actiones adjectitiæ qualitatis. *Burchardi*, l. c. p. 581.

(*c*) Even though they should be entitled to appeal to the Sctum Macedonianum or Velleianum. fr. 3. § 2. D. 14. 6.—fr. 11. § 7. fr. 12. D. 4. 4.—A minor enjoys the restitution also in cases where the state itself is his adversary. fr. 8. D. 4. 1.—But one minor opposed to another can lay claim to the benefit of restitution no further than as the latter became enriched by means of the transaction. fr. 34. pr. D. 4. 4.—fr. 11. § 6. D. ibid.—*Thibaut*, Versuche. Vol. 2. p. 256.—*Hufeland*, Geist d. R. R. Vol. 2. No. 7. p. 36.

(*d*) const. 6. C. 2. 22. "Si intra ætatem, cui succurri solet, in integrum restitutionis auxilio lis inchoata est, nec ei a te renunciatum est; *mors ejus, contra quem hæc fuerit implorata, fraudi tibi esse non potest.*"—Comp. const. 7. C. ibid.

(*e*) For the exceptions to this rule, see fr. 13. § 1. fr. 14. fr. 39. § 1. D. 4. 4.

(*f*) fr. 24. § 4. D. 4. 4.—const. 2. C. 2. 42.

(*g*) In case, however, a minor be restituted against the *adition* of an inheritance, only the legacies (but not the debts) paid may be reclaimed.—fr. 5. D. 12. 6. (Ulpianus) "Nec novum, ut, quod alius solverit, alius repetat. Nam et *quum minor viginti quinque annis, inconsulte adita hereditate, solutis legatis in integrum restituitur, non ipsi repetitionem competere, sed ei, ad quem bona pertinent*, Arrio Titiano rescriptum est."—fr. 22. 31. D. 4. 4. (Ulpianus) "*In integrum vero restitutione postulata adversus additionem a minore factam, si quid legatis expensum est, vel pretia eorum, qui ad libertatem aditione ejus pervenerunt, a minore refundenda non sunt*; quemadmodum per contrarium, cum minor restituitur ad adeundam hereditatem, quæ antea gesta erunt per curatorem bonorum, decreto prætoris ad distrahenda bona secundum juris formam constitutum, rata esse habenda, Culpurnio Flacco Severus et Antoninus rescripserunt."—fr. 31. (Papinianus) "Si mulier, postquam heres extitit, *propter ætatem abstinendi causa in integrum restituta fuerit, servos hereditarios ex fideicommisso ab ea recte manumissos retinere libertatem* respondi; nec erunt cogendi, viginti aureos pro libertate retinenda dependere, quam jure optimo consecuti videntur. Nam et *si quidam ex creditoribus pecuniam suam ante restitutionem ab ea recuperassent, ceterorum querela contra eos qui acceperunt, ut pecunia communicetur, non admittetur.*"

(*h*) fr. 27. § 1. D. 4. 4.—fr. 47. § 1. D. ibid. (Scævola) "Curator adolescentium prædia communia sibi et his, quorum curam administrabat, vendidit. Quæro, si decreto prætoris adolescentes in integrum restituti fuerint, an eatenus venditio rescindenda sit, quatenus adolescentium pro parte fundus communis fuit? Respondi, eatenus rescindi: nisi si emtor a toto contractu velit discedi, quod partem emturus non esset. Item quæro. emtor utrum a Seio et Sempronio pupillis

jority.[a] If, therefore, he who might have sought restitution on account of his minority dies without having done so, the rest of the term that remained to him goes over to his heir; and this begins to run, in case his heir is of age, at the time of the latter's entering upon the inheritance (*aditio hereditatis*), and in case he is a minor, on his attaining his majority.[b]

4. Its Extension to other Persons.

§ 221. The *jura minorum*, that is, the minor's legal benefit of restitution, has been extended, by way of analogy, to some other persons, viz. 1. by the Roman law, to cities,[c] and in modern times to all communities whose affairs are conducted by directors, and especially also to the fiscus;[d] 2. by the canon law, to churches and charitable institutions;[e] and, 3. by modern judicial practice, to insane, prodigal, and infirm persons, whose estates are administered by a curator.[f]

D. Because of Absence.[g]

§ 222. Persons who are of age may also seek restitution on account of *absentia;* but only against *neglects* caused by their absence, and not against legal transactions which they have entered into either per-

pretium cum usuris recipere deberet, an vero ab herede curatoris? Respondi, heredem quidem curatoris teneri; *verum in Seium et Sempronium pro parte, qua eorum fundus fuit, actiones dandas, utique si ad eos accepta pecunia pro eadem parte pervenisset.*"

(*a*) const. 2. § 2–4. C. Theod. 2. 16.—const. 7. C. 2. 53.—An exception takes place with regard to a *suus heres*, who has declined a paternal inheritance; for he is still allowed to claim the same within three years after the expiration of the *quadriennium restitutionis*. const. 6. C. 6. 31.—*Schröter*, l. c. p. 155.

(*b*) fr. 18. § 5. fr. 19. D. 4. 4.—const. 5. C. 2. 53. "Ea, quæ de temporibus in integrum restitutionum legibus cauta sunt, custodiri convenit, et si forte quis beneficio nostro ætatis veniam fuerit consecutus: *ex eo die, quo indulgentia nostra in judicio competenti fuerit intimata, eique administratio rei propriæ permissa, ad persequendas in integrum restitutiones finiendasque causas jure tempus habeat præstitutum:* ita tamen, ut nunquam minoribus viginti quinque annis constitutis, de his, quæ ante impetratam veniam ætatis gesserunt, auxilium in integrum restitutionis denegetur."

(*c*) fr. 78. § 1. D. 31.—const. 3. C. 11. 29.—const. 1. C. 1. 50—const. 4. C. 2. 54.

(*d*) *Burchardi* (l. c. p. 259) is of another opinion.

(*e*) Tit. X. 1. 41.—Tit. 1. 21. in 6to.—The *quadriennium* begins to run from the day the injury suffered is completed. — Clem. un. de rest. in integrum (1. 11). "Ab ecclesia adversus lapsum temporis, in quo se læsam affirmat, in integrum restitutio peti potest, et causa restitutionis hujusmodi finiri debet *intra quadriennium continuum a tempore læsionis*, etiam si minus quadriennio tempus læsionis existat. Sed non fiat restitutio, nisi ad tantum tempus, quantum se læsam fore probabit."—*Vermehren* in the Archiv Civ. Prax. Vol. 10. p. 392. But see above, p. 217. note *d*.

(*f*) arg. fr. 1. pr. D. 4. 4. (Ulpianus) "Hoc edictum prætor *naturalem æquitatem secutus* proposuit: quo tutelam minorum suscepit, nam cum inter omnes constet, fragile esse et infirmum hujusmodi ætatis consilium, et multis captionibus suppositum, multorum insidiis expositum: auxilium eis prætor hoc edicto pollicitus est, et adversus captiones opitulationem."—fr. 8. § 1. D. 27. 9. (Ulpianus) "Sed si curator sit furiosi, vel cujus alterius non adolescentis, videndum est, utrum jure veteri valebit venditio, an hanc orationem admittemus? Et puto, quia de pupillis princeps loquitur, et conjunctim tutoribus curatores accipiuntur, pertinere: et de ceteris puto ex sententia orationis idem esse dicendum."—fr. 11. D. ibid. (Idem) "Si prædia minoris viginti quinque annis distrahi desiderentur, causa cognita Præses provinciæ debet id permittere. *Idem servari oportet, et si furiosi, vel prodigi, vel cujuscunque alterius prædia curatores velint distrahere.*"—const. 3. C. 2. 22.—*Glück*, Comm. Vol. 6. § 465. Contra: *Burchardi*, l. c.

(*g*) Dig. 4. 6.—Titt. Cod. II. 51. 52. 54.—§ 5. J. 4. 6.—*Glück*, Comm. Vol. 6. § 467 seqq.—*Burchardi*, l. c. § 12.—*Thibaut*, System. 7th Edit. § 1012 seqq.

sonally or by their attorney.[a] By *absentia* is here meant not merely the being at a distance from a place, but in general every actual hinderance by which one is prevented from prosecuting his right, e. g. mental derangement, imprisonment, &c. (§ 137).

I. In the cases where this kind of restitution takes place, a distinction must be made between absence of the prosecutor and absence of the defendant. 1. When a man has reason to dread an injury from *his opponent's* absence, he can obviate it by entering a legal protest to that effect before a court, a notary, or three witnesses;[b] but if he has omitted to do so, restitution always follows, provided the absentee has left no agent in his place.[c] 2. Whether a man, who has suffered an injury in consequence of neglecting to prosecute his rights, is entitled to the *in integrum restitutio* on account of *his own* absence, depends on the cause of his absence. Thus: *a.* If it was a case of *necessary* absence, he is always allowed restitution, provided he left no attorney or can obtain no compensation from him.[d] But where the necessary absence has been owing to some disgraceful cause, he obtains restitution only in case it was not his own fault that he could leave no attorney;[e] *b.* If it was a case of *voluntary* absence, no restitution is ever granted when it arises from a cause which is discreditable to him;[f] but in every other case he will enjoy the benefit of restitution, provided he is not to blame for not having appointed an attorney to act for him during his absence;[g] or, in case an attorney was appointed, provided he is no longer able to obtain compensation from him.[h]

(*a*) fr. 7. pr. § 1. D. 4. 1. (See the princ. p. 215. note *c.*) (Marcellus) § 1. "Nec intra has solum species consistet hujus generis auxilium, etenim et deceptis sine culpa sua, maxime si fraus ab adversario intervenerit, succurri oportebit, cum etiam de dolo malo actio competere soleat: et boni prætoris est, potius restituere litem, ut et ratio et æquitas postulabit, quam actionem famosam constituere; ad quam tunc demum descendendum est, cum remedio locus esse non potest."—fr. 1. pr. D. 4. 6. (Ulpianus) "Hujus edicti causam nemo non justissimam esse confitebitur: *læsum enim jus per id tempus, quo quis reipublicæ operam dabat, vel adverso casu laborabat, corrigitur*, nec non et adversus eos qui vel absentes reipublicæ causa fuerant, vel apud hostes detenti, succurritur: ne vel obsit, vel prosit quod evenit."—fr. 41. D. ibid. (Julianus) "Si quis Titio legaverit, si mortis suæ tempore in Italia esset, aut in annos singulos, quot in Italia esset: *et ei succursum fuerit, quia ob id, reipublicæ causa abfuit, exclusus fuerit a legato*, quod fideicommissum ab eo relictum præstare cogitur. Marcellus notat: quis enim dubitavit, salva legatorum et fideicommissorum causa, militi restitui hereditatem, quam ob id perdidit, quod reipublicæ causa abfuit?"—fr. 16. fr. 27. D. 4. 6. —*Thibaut*, System. § 1013.—*Francke*, Civ. Abh. Vol. 1. p. 68 seqq.

(*b*) fr. 15. 26. § 9. D. 4. 6.—fr. 29. D. ibid. (Africanus) "Videlicet, *ne cui officium publicum vel damno. vel compendio sit.*"—fr. 39. ibid. (Paulus) "*Is qui reipublicæ causa abfuturus erat, si procuratorem reliquerit, per quem defendi potuit, in integrum volens restitui non audietur.*"—const. 10. C. 2. 13.—cap. 2. X. 1. 41.

(*c*) fr. 26. § 1. D. 4. 6. (Ulpianus) "Adversus relegatum restitutionem faciendam ex generali clausula, Pomponius ait: sed *non et ipsi concedendam, quia potuit procuratorem relinquere*; ex causa tamen puto etiam ipsi succurrendum." fr. 40. § 1. ibid. (Idem) "Quod eo tempore, quo in insula aliquis fuit, ex pœna ei irrogata, cujus restitutionem impetravit, ab alio usurpatum ex bonis, quæ non erant ademta probatum fuerit, *suæ causæ restituendum est.*"

(*d*) fr. 14. ibid.

(*e*) fr. 28. pr. D. ibid. (Ulp.) "Nec non et si quis *de causa probabili* abfuerit, deliberare debet prætor, an ei subveniri debeat, *puta studiorum causa, forte procuratore suo defuncto, ne decipiatur per justissimam absentiæ causam.*"

(*f*) const. 2. C. 7. 40.—*Thibaut*, Verjährr. § 72.—*Löhr* in his Mag. Vol. 4. p. 379.—*Burchardi*, l. c. p. 189 seqq.

(*g*) fr. 1. fr. 21. pr. § 2. 3. fr. 22. fr. 39. ibid.

(*h*) fr. 28. § 5. D. 4. 6.—§ 5. J. 4. 6.

II. In those cases above mentioned where a man is entitled to demand restitution on account of absence, he can obtain the restoration of his right in different ways, according to circumstances: viz. *a.* when in consequence of his absence he has lost a right which he had already acquired, the prætor restores to him the action arising from this right (*actio restitutoria s. rescissoria*);[a] *b.* when through his absence he has been prevented from acquiring a right, the prætor grants him the same action, by way of an *actio utilis*, which he would have had, if he had actually acquired the right (*actio institutoria*);[b] *c.* when he is in a condition to make his right available by means of an exception, he has the *exceptio rescissoria* against the plaintiff's claim.[c] The *quadriennium restitutionis* commences its course from the day when the return takes place or the hinderance ceases to operate.[d]

E. Because of Error.

§ 223. When a person has suffered injury in consequence of an error committed without any fault on his part, and has no other legal remedy for the recovery of what he has thus lost, he may pray to be reinstated in his former condition.[e] This restitution, however, seems to have been at first intended only to protect parties against the injurious consequences of oversights committed in the practice of the strict jus civile. At the present day, a restitution can be sought only as a *restitutio ex clausula generali prætoris*, in cases where the error is not allowed to prejudice the party by whom it is committed.[f]

F. Because of Capitis deminutio.[g]

§ 224. *Capitis deminutio* terminated all the legal relations of the party who suffered the diminution, as far as they rested on the jus civile; consequently also all *obligationes stricti juris*, and that as well for him as against him.[h] But in the case of a *capitis deminutio minima*, the prætor restored to the creditors of the *capitis minutus* their former actions against him,[i] while the latter could not obtain the restitution of

(*a*) fr. 17. 41. 43. D. ibid.—arg. fr. 8. § 14. D. 16. 1.

(*b*) fr. 28. § 5. D. 4. 6.

(*c*) const. 7. § 1. C. 2. 53.

(*d*) fr. 2. D. 4. 1.—*Glück*, Comm. Vol. 4. § 296.—*Thibaut*, Versuche. Vol. 2. p. 129.—*Francke*, Civ. Abh. Div. 1. p. 84 seqq.—*Burchardi*, l. c. § 21.

(*e*) E. g.: § 23. J. 4. 6.—fr. 1. § 17. D. 42. 6.—fr. 1. § 5. 6. D. 27. 6. (Ulpianus) "Idem Pomponius scribit, etiamsi pro tutore negotia gerens auctoritatem accommodaverit, nihilominus hoc edictum locum habere, nisi forte prætor decrevit, ratum se habiturum id, quod his auctoribus gestum est: *tunc enim valebit per prætoris tuitionem, non ipso jure.* § 6. Ait prætor: *si id actor ignoravit, dabo in integrum restitutionem.* Scienti non subvenit, merito: quoniam ipse se decepit." Respecting the passage last cited, see *Keller*, Litiscontestation. p. 573.

(*f*) E. g.: fr. 7. pr. D. 4. 1.

(*g*) Dig. 4. 5.—*Glück*, Comm. Vol. 6. § 466.—*Seckendorf* de capit. dem. minima. § 34.—*Zimmern*, R. G. Vol. 1. p. 844. Vol. 3. p. 321.—*Burchardi*, l. c. § 17.—*Schneider*, Die allgem. subsid. Klagen des Röm. Rechts. p. 278 seqq.

(*h*) *Gaius*, III. 83.—fr. 8. D. 4. 5.—§ 1. J. 3. 10 (11).

(*i*) fr. 2. pr. § 1. 2. D. ibid. (Ulpianus) "Pertinet hoc edictum *ad eas capitis deminutiones, quæ salva civitate contingunt*; ceterum sive amissione civitatis, sive libertatis

his extinguished claims, neither could the creditor who had arrogated his debtor.[a] This kind of restitution has never been employed in Germany.

G. Because of Alienatio judicii mutandi causa facta.[b]

§ 225. By an *alienatio judicii mutandi causa facta*, is meant an alienation *inter vivos*,[c] undertaken by a person to the injury of another, with the evil intent[d] of giving him another opponent, so that he may be prejudiced or entirely frustrated in the prosecution of his right.[e] In such a case the alienation itself is never rescinded,[f] but the following remedies are given to the party who has been injured thereby: viz. 1. He is entitled to bring an *actio in factum* for damages (the *id quod interest*) against the alienator, in case the latter alienated the thing which he possessed and on account of which he feared to be sued.[g] 2. He may

amissione contingat capitis deminutio, cessabit edictum, neque possunt hi penitus conveniri. Dabitur plane actio in eos, ad quos bona pervenerunt eorum. § 1. Ait prætor: 'Qui quæve postea, quam quid cum his actum contractumve sit, capite minuti minutæve esse dicentur, *in eos easve perinde, quasi id factum non sit, judicium dabo.*' § 2. Hi qui capite minuuntur, ex his causis, quæ capitis deminutionem præcesserunt, manent obligati naturaliter; ceterum si postea imputare quis sibi debebit, cur contraxerit, quantum ad verba hujus edicti pertinet. Sed interdum si contrahatur cum his *post capitis deminutionem danda est actio.* Et quidem si arrogatus sit, nullus labor est; nam perinde obligabitur ut filiusfamilias."—*Gaius*, IV. 38.

(*a*) fr. 2. § 4. D. ibid. (Ulpianus) "*Ei, qui debitorem suum arrogavit, non restituitur actio in eum, postquam sui juris fiat.*"

(*b*) Dig. 4. 7.—Cod. 2. 55.—Decretal. Greg. 1. 42.—*Mühlenbruch*, Cession. § 29.—*Glück*, Comm. Vol. 6. § 473.—*Schröter* in the Z. f. Civ. R. u. P. Vol. 6. p. 147.

(*c*) fr. 8. § 3. D. 4. 7. (Paulus) "Sed *heredem instituendo, vel legando*, si quis alienet, huic edicto locus non erit."

(*d*) fr. 3. § 5. fr. 4. § 1. 3. 5. D. ibid. (Gaius) "Quid ergo est si is, adversus quem talis actio competit, paratus sit utile judicium pati, perinde ac si possideret? Recte dicitur, *denegandam esse adversus eum ex hoc edicto actionem.*" fr. 4. (Ulpianus) § 1. "Itemque fieri potest, ut sine dolo malo quidem possidere desierit, *verum judicii mutandi causa id fiat.* Sunt et alia complura talia. Potest autem aliquis dolo malo desinere possidere, *nec tamen judicii mutandi causa fecisse, nec hoc edicto teneri*; neque enim alienat, qui duntaxat omittit possessionem. Non tamen ejus factum improbat prætor, qui tanti habuit re carere, ne propter eam sæpius litigaret, (hæc enim verecunda cogitatio ejus, qui lites execratur, non est vituperanda) *sed ejus duntaxat, qui cum rem habere vult, litem ad alium transfert, ut molestum adversarium pro se subjiciat.*" § 3. "Si quis autem ob valetudinem, aut ætatem, aut occupationes necessarias litem in alium transtulerit, *in ea causa non est, ut hoc edicto teneatur, cum in hoc edicto doli mali fiat mentio.* Ceterum erit interdictum et per procuratores litigare, dominio in eos plerumque ex justa causa translato." § 5. "Hæc actio in id, quod interest, competit, *proinde si res non fuit petitoris, aut si is, qui alienatus est, sine culpa decessit: cessat judicium; nisi si quid actoris præterea interfuit.*"

(*e*) fr. 1. pr. D. ibid. (Gaius) "Omnibus modis proconsul id agit, ne cujus deterior causa fiat ex alieno facto. Et cum intelligeret judiciorum exitum interdum duriorem nobis constitui, opposito nobis alio adversario, in eam quoque rem prospexit: *ut si quis alienando rem alium nobis adversarium suo loco substituerit, idque data opera in fraudem nostram fecerit*, tanti nobis in factum actione teneatur, quanti nostra intersit, alium adversarium nos non habuisse."

(*f*) For this very reason the name restitution, although used by Gaius, applies but improperly to the case contemplated in fr. 3. § 4. D. ibid. (Gaius) "Ex quibus apparet, quod proconsul *in integrum restituturum* se pollicetur: ut hac actione officio tantum judicis consequatur actor, quantum ejus intersit alium adversarium non habuisse: forte, si quas impensas fecerit, aut si quam aliam incommoditatem passus erit, alio adversario substituto."—const. un. C. 2. 55. "Cum in rem actionem possessio pariat adversario, alienatione etiam judicii mutandi causa celebrata *in integrum restitutio* edicto perpetuo permittatur; intelligis, si rem, ne secum ageretur, qui possidebat, venundedit et emtori tradidit: quem elegeris, conveniendi tibi tributam esse jure facultatem."

(*g*) fr. 1. § 1. D. ibid. (Gaius) "Itaque si alterius provinciæ hominem, aut potentiorem nobis opposuerit adversarium, *tenebitur.*"—fr. 3. § 1. ibid. (Idem) "Sed et si hominem, quem petebamus, manumiserit, durior nostra con-

refuse to accept the suit of a more formidable adversary, by means of the exception that the alienation has been made *judicii mutandi causa*, in case the cause of action on which the plaintiff sues was transferred to him by the original creditor with the evil intent of making the defence more difficult. The alienator himself however usually retained, according to the older law, his right of action;[a] but according to the later law, he lost this right whenever he transferred it with an evil intent to one who had it more in his power to oppress the debtor (*cessio in potentiorem*).[b]

II. Restitutio ex clausula generali Prætoris.

§ 226. Besides the before-mentioned restitutions for special reasons, the prætor promised, in the general clause appended to the Edict respecting absence, to grant restitution for other reasons also, whenever equity appeared to demand it.[c] This so-called *restitutio ex clausula generali* (*Prætoris*) may therefore be sought in all cases where one has been hindered in the prosecution of his rights, by external events or by the act of a third party, without any fault of his own.[d] It is granted,

ditio fit, quia prætores favent libertatibus. § 2. Item, si locum, in quo opus feceris, cujus nomine interdicto Quod vi aut clam, vel actione aquæ pluviæ arcendæ tenebaris, alienaveris: durior nostra conditio facta intellegitur, quia si tecum ageretur, tuis impensis id opus tollere deberes: nunc vero, cum incipiat mihi adversus alium actio esse, quam qui fecerit, compellor meis impensis id tollere, quia qui ab alio factum possidet, hactenus istis actionibus tenetur, ut patiatur id opus tolli."—fr. 2. D. ibid.—fr. 4. pr. D. ibid. (Ulpianus) "Item, si res fuerint usucaptæ ab eo, cui alienatæ sunt, nec peti ab hoc possint: *locum habet hoc edictum.*"—fr. 4. § 5. 6. fr. 5. 7. D. ibid.

(*a*) fr. 11. D. ibid.—Except in the case of the Lex Licinia, as will be seen from fr. 12. D. ibid. (Marcianus) "*Si quis judicii communi dividundo evitandi causa rem alienaverit, ex lege Licinia ei interdicitur, ne communi dividundo judicio experiatur*, verbi gratia, ut potentior emtor per licitationem vilius eam accipiat, et per hoc iterum ipse recipiat. *Sed ipse quidem, qui partem alienaverit, communi dividundo judicio si agere velit, non audietur*; is vero, qui emit, si experiri velit, ex illa parte edicti vetatur, qua cavetur, ne qua alienatio judicii mutandi causa fiat."—fr. 24. § 1. D. 10. 3. (Julianus) "Cum agere tecum communi dividundo vellem, partem tuam Titio tradidisti, mutandi judicii causa: *teneris mihi prætoria actione, quod fecisses, ne tecum communi dividundo ageretur.*"—*Dirksen*, Beitr. p. 312.

(*b*) const. 1. 2. C. 2. 14.—*Mühlenbruch*, l. c.

(*c*) fr. 1. § 1. in fin. D. 4. 6. "ITEM SI QUA ALIA MIHI JUSTA CAUSA ESSE VIDEBITUR, IN INTEGRUM RESTITUAM."—fr. 26. § 9. ibid. —Comp. *Glück*. Comm. Vol. 6. § 471. 472. and especially *Francke*, Civ. Abh. Div. 1. p. 83–84.—*Burchardi*, l. c. p. 179. 183. 191.

(*d*) For instance fr. 1. § 9. D. 43. 19. (Ulpianus) "Si quis propter inundationem usus non sit itinere actuque hoc anno, cum superiore usus sit; *potest repetita die hoc interdicto uti per in integrum restitutionem ex illa parte: Si qua mihi justa causa esse videbitur.* Sed etsi per vim hoc ei contigerit, *in integrum eum restitui oportere*, Marcellus probat. Præterea *et aliis casibus interdictum repetita die competit, ex quibus in integrum quis restitutionem impetrare solet.*" —fr. 34. § 1. D. 8. 3. (Papinianus) "Si fons exaruerit, ex quo ductum aquæ habeo, isque post constitutum tempus ad suas venas redierit: *an aquæductus amissus erit? quæritur.*"—fr. 35. D. ibid. (Paulus) "Et Atilicinus ait, Cæsarem Statilio Tauro rescripsisse, in hæc verba: Hi, qui ex fundo Sutrino aquam ducere soliti sunt, adierunt me, proposueruntque, aquam, qua per aliquot annos usi sunt, ex fonte, qui est in fundo Sutrino, ducere non potuisse, quod fons exaruisset; et postea ex eo fonte aquam fluere cœpisse; petieruntque a me ut, *quod jus non negligentia aut culpa sua amiserant, sed quia ducere non poterant*, his restituaretur. Quorum mihi postulatio cum non iniqua visa sit, succurrendum his putavi. *Itaque quod jus habuerunt tunc, cum primum ea aqua pervenire ad eos non potuit, id eis restitui placet.*"—fr. 26. § 7. D. 4. 6. (Ulpianus) "Si feriæ extra ordinem sint indictæ, ob res puta prospere gestas, vel in honorem principis, et propterea magistratus jus non dixerit: Gaius Cassius nominatim edicebat *restituturum se, quia per prætorem videretur factum, solen-*

however, like the restitution on account of absence, only against innocent *neglects* and the injurious consequences arising from them; it occurs very often, and more especially in proceedings. To this kind of restitution belong, among others, the following cases: 1. When a person has been prevented by sickness, or any other unavoidable accident to himself or family, from performing any act before a court, the omission of which has injuriously affected his interests. 2. When a person has suffered injury in a suit through the fault of his attorney.[a] 3. When a person has been prevented by an act of the judge himself from prosecuting his right at the proper time, as e. g. by his making unusual vacations, or by his delaying to summon the defendant, or altogether refusing to administer justice.[b] 4. When a person has suffered injury through an excusable ignorance or mistake, as e. g. through his ignorance of the citation issued (*citatio edictalis*), on account of which he has been excluded from the bankrupt's estate.[c]

nium enim feriarum rationem haberi non debere, quia prospicere eas potuerit, et debuerit actor, ne in eas incideret: quod verius est, ita Celsus lib. II. Digestorum scribit. Sed cum feriæ tempus eximunt, restitutio duntaxat ipsorum dierum facienda est, non totius temporis: et ita Julianus lib. IV. Digestorum scribit, ait enim, rescissionem usucapionis ita faciendam, ut hi dies restituantur, quibus actor agere voluit, et interventu feriarum impeditus est."

(*a*) *Klein*, Rechtssprüche. Vol. 1. No. 43 p. 346.—*Höpfner*, Commentar. Edited by A. D. Weber. 8th Edit. § 1010.

(*b*) fr. 1. § 1. fr. 26. § 7. D. 4. 6.

(*c*) fr. 2. fr. 7. pr. D. 4. 1.

SPECIAL PART.

FIRST BOOK.

REAL RIGHTS.

Nature of Real Rights.

§ 227. A *real right* is that right which a person enjoys in a thing itself, and by virtue of which the latter is entirely, or in certain respects, subjected to his juridical power and free disposal.[a] From the notion and nature of a real right, these general principles may be deduced: 1. Every real right confers the *juridical* power of free disposal; it is thus materially distinguished from the mere possession of a thing, which is only the *physical* power of free disposal. A real right is therefore not dependent upon the possession of the thing, and is not lost with the loss of possession. 2. Every real right is in itself an absolute right; that is, he on whom it is conferred enjoys such right over the thing itself against all other persons, and it may exist without having respect to any certain person obliged (§ 15). The duty on the part of all others corresponding to this right, is merely the general negative one, not to hinder him who has the right in the exercise and enjoyment thereof (§ 16). This is the characteristic distinction between real rights and rights of obligation (§ 195). 3. Every real right may be

(*a*) Respecting the definition of real rights, see *Thibaut*, Vers. Vol. 2. No. 1.—*Feuerbach*, Civ. Vers. Vol. 1. No. 8.—*Unterholzner*, Verjährung. Vol. 2. p. 161 seqq.—*Du Roi*, Spec. observationum de jure in re. Heidelberg, 1812. (Reviewed by Hugo in the Gött. gel. Anz. 1813. p. 145.)—*Du Roi* in the Archiv Civ. Prax. Vol. 6. p. 252. 386.—*Schweppe* in his Jur. Mag. No. 1. p. 13.—Roeshirt suggests, that in explaining the nature of real rights we should consider: 1. the nature of the *actio in rem* and of the *jus rerum* of the Romans; 2. the views of the Glossators, who derived the real rights or jura realia from the actio in rem, without any reference to the strict Roman definition of the jus rerum; 3. the later practical views with respect to the actio in rem scripta; 4. the modern philosophical theories, such as that given here by Mackeldey and that given by *Savigny* in his System. Vol. 1. p. 167 seqq.—*Braun*, Erörterungen. p. 69–79.

enforced by an *actio in rem* against him who is in possession of the thing, or against any one who may contest the right.[a] 4. Every real right necessarily terminates when the thing perishes to which it relates.[b]

Their Different Kinds.

§ 228. With respect to the rights of things, the Roman law makes a distinction between *dominium* (the right of property) which embraces all the rights that may be held in a thing, and *jura in re*, that is, single rights which, being separated from the dominium, exist independently of it and are enjoyed by some other person than him who has the dominium.[c] The modern jurists for this reason call them "*jura in re aliena*." To these belong the *servitudes*, the *emphyteusis*, the *superficies*, and the right of *pawn* and *mortgage*.[d] Besides the *dominium* and *jura in re* just mentioned, the right of inheritance, that is to say, the right of the heir in the inheritance acquired by him, does indeed belong to the real rights, since it may be prosecuted by an *actio in rem*; yet it is distinguished from all other real rights, in this respect, that it has for its object not single things, but the whole estate left by the deceased as a juridical unity, or *universitas juris* (§ 150).[e] Possession, on the other hand, in itself considered, is not a right, but merely a condition of fact; all that can be said of possession is, that under certain suppositions, it

(*a*) *Gaius*, IV. 3.—fr. 25. pr. D. 44. 7.—*Du Roi*, in the Archiv Civ. Prax. Vol. 6. p. 416.

(*b*) fr. 8. pr. D. 20. 6. (Marcianus) "Sicut *re corporali extincta*, ita et usufructu extincto, *pignus hypothecave perit*." — fr. 23. D. 7. 4. (Pomponius) "*Si ager, cujus ususfructus noster sit, flumine vel mari inundatus fuerit, amittitur ususfructus: cum etiam ipsa proprietas eo casu amittatur*; ac ne piscando quidem retinere poterimus usumfructum. Sed quemadmodum, si eodem impetu discesserit aqua, quo venit, restituitur proprietas, ita et usumfructum restituendum dicendum est."—fr. 14. D. 8. 6. (Javolenus) "*Si locus*, per quem via, aut iter, aut actus debebatur, *impetu fluminis occupatus esset*, et intra tempus, *quod ad amittendam servitutem* sufficit, alluvione facta, restitutus est: servitus quoque in pristinum statum restituitur. Quod si id tempus præterierit, ut servitus amittatur, renovare eam cogendus est."

(*c*) *Wächtler*, Diss. de jure in re Wittenberg, 1682. (also in *Thomasii* Diss. Lipsiens. Leipsic and Halle, 1696. p. 235–296.) —*Huber*, Animadversiones ad jus in re, in Digress. Justin. lib. 4. c. 10.— *Savigny*, Recht des Besitzes, 5th edition. p. 97.—*Zimmern*, Römischrechtl. Untersuchungen. p. 102.

(*d*) Other views and opinions are maintained in: *Born*, Diss. de jure in re. Leipsic, 1662.—*Hahn*, Diss. de jure rerum et juris in re speciebus. Helmstedt, 1664.—*Nettelbladt*, Diss. de jure in re, quæ est res nullius. Halle, 1779.—See the writings cited above, § 227. note *a*., and *Glück*, Comm. Vol. 2. § 178.

(*e*) The right of inheritance in the Roman law is sometimes regarded as an acquisitio per universitatem. § 6. J. 2. 9. (see on this passage *Donelli* Comm. jur. civ. lib. 6. c. 1.); but it is also frequently regarded as the quasi dominium heredis, or the right of the heir in the inheritance. § 7. J. 2. 19. —fr. 48. pr. D. 28. 5. (Marcianus) "His verbis: Titius *hereditatis meæ dominus* esto, recte institutio fit." In the latter sense it undoubtedly belongs to the real rights for it is the distinguishing characteristic of real rights, that they alone can be prosecuted by an *in rem actio*, and the *hereditatis petitio* which is given to the heir is an *in rem actio*. See *Du Roi* in the Archiv Civ. Prax. Vol. 6. p. 416. But in order to exhibit clearly the different relations in which the right of inheritance may be considered, it seems preferable to treat of it separately.

(*f*) fr. 1. § 3. D. 41. 2. "Possessio facti non juris est."—*Savigny*, Recht des Besitzes. § 2–5.—Contra: *Schweppe* in his jurist. Mag. No. 1. p. 39.—*Puchta* in the Rhein. Mus. Vol. 3. p. 289.—*Gans*, System des Röm. Civilrechts. p. 211.—*Du Roi*, Observationes de jure in re. Heidelberg, 1812. § 1.; but the opinions of the latter writers are opposed by *Rudorff*, in the Z. f. gesch. R. W. Vol. 7. p. 94.; and *Hasse* in the Rhein. Mus. Vol. 6. p. 184.

produces juridical effects, as, under those suppositions, certain rights grow out of it and are connected with it, especially the rights to interdicts and prescription.[a] Possession, therefore, though it is by itself no right, is yet, as a source of rights, a condition which comes under the cognizance of the law: with relation to the things which are its objects, it forms a provisional or temporary condition of right, and for this reason the doctrine of possession must precede that of dominium and other real rights.*

(a) fr. 49. pr. D. 41. 2. "Plurimum ex jure mutuatur possessio."—fr. 49. § 1. ibid. "Qui in aliena potestate sunt, rem peculiarem tenere possunt; habere, possidere non possunt: *quia possessio non tantum corporis, sed et juris est.*"—See *Göschel*, Zerstreute Blätter. Vol. 1. p. 297 seqq. p. 360 seqq. and *Stahl*, Philosophie des Rechts. Vol. 2. Div. 1. p. 157.—*Höpfner*, Commentar. Edited by A. D. Weber. § 281 seqq.

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* The erroneous views here stated in the text will be more fully considered in the succeeding note: but, in order to guard against the formation of misconceptions at the beginning, it will be proper to make here a few preliminary observations. "Possession," says Mackeldey, "in itself considered, is not a right, but merely a condition of fact." And how is this supported? By a reference to fr. 1. § 3. D. 41. 2: where the words "*possessio facti, non juris*," occur. But let us see how and in what connexion they are employed. Here is the passage itself: "Furiosus et pupillus sine tutoris auctoritate non possunt incipere possidere, quia affectionem tenendi non habent, licet maxime corpore suo rem contingant, sicuti si quis dormienti aliquid in manu ponat. Sed pupillus tutore auctore incipiet possidere. Ofilius quidem et Nerva filius etiam sine tutoris auctoritate possidere incipere posse pupillum aiunt; eam enim rem facti, non juris esse. Quæ sententia recipi potest, si ejus ætatis sit, ut intellectum capiat." Here Paulus openly rejects the opinion entertained by *Ofilius* and *Nerva* the younger, together with the argument which they employed in support of it. Had he regarded it as correct, he would have expressed his approbation accordingly. This however, he has not done (*non* possunt incipere possidere; quia *affectionem* tenendi non habent, licet maxime corpore suo rem contingant, &c.); on the contrary, he declares that their view is admissible only under the supposition that the ward is already capable of *willing* to a certain degree ("quæ sententia recipi *potest, si* ejus ætatis sit, ut *intellectum* capiat"). In other words, Paulus considers *will* as an essential requisite to juridical possession, and consequently he does not regard the latter as a mere fact; although wards, as is well known, are readily favoured where acquisition comes in question. Our author evidently feels himself here on unsafe ground; for by adopting Savigny's theory, he falls into Savigny's contradictions. He thus continues: "Possession, though it is by itself no right, is yet a juridical condition." We would here ask the following simple questions:

1. How can a condition be "merely one of fact" and yet at the same time "a condition of right?" A fact can be nothing more than a fact. The comparison would not be unapt, were we to liken detention, possession, and ownership to the progressive stages of caterpillar, chrysalis, and butterfly. Now the chrysalis bears a close analogy to the last of these states, into which it is about to be converted; being itself a butterfly in embryo, it has no longer any relation to the first, which has already ceased to exist: yet it would be just as correct to say that caterpillar and chrysalis are identic, as to assert that the mere lifeless fact of detention is essentially the same with juridical possession; for it is the animating spirit (the *will*) that gives to the latter as well as to absolute ownership their character and importance. Although detention is a condition of fact, and is the substance of juridical possession—and even, though in a less strict sense, of property itself; yet this, it is evident, may have no more influence on the nature of juridical possession than it has on that of property, since they come in fact under an entirely different category. Our author confutes himself by referring to fr. 49. pr. § 1. D. 41. 2. where Papinian says: "Possessio quoque per servum, cujus ususfructus meus est, ex re mea vel ex operis servi acquiritur mihi, quum et naturaliter a fructuario teneatur, et plurimum ex jure possessio mutuetur. § 1. Qui in aliena potestate sunt, rem peculiarem tenere possunt;

CHAPTER I.

POSSESSION.[a]

The *essence* of possession, simple as to every one it may appear, has been so much mistaken by many civilians, that they have committed serious errors both in tracing its foundation and in assigning to it its place in the system. They have confounded accidentals with essentials: and thus, those things which are of the most intrinsical importance in the doctrine of possession, namely, its basis and general char-

(a) LITERATURE: *Donelli* Comm. jur. civ. Lib. 5. c. 6–13.—*Cujacii* Recitationes ad Dig. et Cod. h. t. (in his Works, Vol. 8. 9.)—*Ramos* del Manzano ad tit. Dig. de acquirenda poss.; in Meerman's Thesaurus. Vol. 7. p. 78–114.—*De Retes* ad eundem tit. Dig. ibid. Vol. 7. p. 454–539.—*Pothier*, Traité de la possession et de la prescription. Paris and Orleans, 1772. A new edition. Paris, 1807.—*Westphal*, Ueber die Arten der Sachen, Besitz, &c. Leipsic, 1788.—*Cuperi* Observat. selectæ de natura possessionis. Leyden, 1789. Edited and improved by Thibaut. Jena, 1804.—*Thibaut*, Ueber Besitz und Verjährung. Jena, 1802.—*Lange*, Phil. jurist. Abh. über die Natur des Besitzes. 2 Vols. Erlangen, 1813. 1818.—*Hufeland*, Neue Darstellung der Rechtslehre vom Besitz. Giessen, 1816.—The best of the later works on this subject is: *Savigny*, Das Recht des Besitzes. Giessen, 1803. The 6th edition 1837. The more recent publications on this subject are: *Warnkönig*, Analyse du traité de la possession par M. De Savigny. Liege, 1824. 3d edition. 1837.—*T. M. Zachariä*, Neue Revision der Theorie des Röm. Rechts vom Besitz (with special reference to Savigny's work). Leipsic, 1824.—*Koch*, System. Darstellung der Lehre vom Besitze. (According to the Prussian law of possession, in comparison with the German common law). Berlin, 1826.—*Schollaert*, Responsio ad quæstionem: quid sit possessio, quotuplex, quomodo acquiratur, retineatur et amittatur; in Annalibus Acad. Louvain, 1820.—*Dubus* de possessione ex jure Romano. Louvain, 1825.—*Lerminier* de possessione analytica Savignianæ doctrinæ expositio. Paris, 1828.—A full account of the whole literature of the subject is given by Savigny in his introduction to the sixth edition of his work, to which may be added the following: *Tigerström*, Ueber die bonæ fidei possessio. Berlin, 1836.—*Gans*, Ueber die Grundlage des Besitzes. Berlin, 1839.—*Pfeiffer*, Ueber den Besitz nach Römischem Recht. Tubingen, 1840.—*Rosshirt*, Ueber Besitz und Eigenthum des Französischen Rechts. Heidelberg, 1842.—*A. Köppe*, Zur Lehre vom Besitz. Berlin, 1839.

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habere et possidere non possunt, quia possessio non tantum corporis sed et juris est."—Papinian thus adduces at once, in support of his view, the argument that possession preëminently contains within itself a juridical element ("*plurimum* EX JURE mutuetur"), and that those who are incapable of willing ("qui in potestate sunt") may indeed have detention, but not juridical possession; since this is not a fact, but a right ("quia *possessio* non tantum corporis, sed et *juris* est"). If we connect herewith the many other declarations of the Roman jurists, which place this beyond a doubt, it seems scarcely conceivable how the true view which they entertained can be denied. To this effect speaks *Ulpian* in many places, e. g. in fr. 29. D. ibid. fr. 2. § 38. D. 43. 8.; *Paulus* in fr. 2. D. 43. 17. and fr. 41. D. 41. 2.; *Papinian* in fr. 44. D. 41. 2.; *Javolenus* in fr. 23. § 2. fr. 26. D. ibid.; *Proculus* in fr. 27. D. ibid.; *Marcian* fr. 5. D. 48. 6.; and besides many other passages, also const. 4. 10. C. 7. 32. And what can better demonstrate that Paulus regarded juridical possession as a right and not as a fact, than the declaration he makes in fr. 1. § 1. D. 41. 2. where he explains the right of ownership as originating in juridical possession?

2. Why does our author restrict possession to things merely? He himself treats of the possession of "servitudes;" and is there not also possession with respect to all permanent rights? is there not, e. g. a possession of privileges, as indeed this Compendium (§ 190 seqq.) itself teaches?

3. Is it logically correct to place a doctrine whose application is not confined to things, but extends to all permanent rights, among the rights of things? And yet it is done by the majority of civilians.

acter, have been entirely lost sight of. Hence it has resulted that the special relation borne by possession to interdicts and prescription, has been regarded as the only effect which can render it of juridical importance in the system of law—a view which, by reason of Savigny's advocacy of it, has been widely adopted. To this theory Mackeldey also inclines; and hence he has treated of the subject under the Rights of Things. Possession, however, is *wholly general* in its nature, and has reference also to other rights; for possession is nothing else than the *exercise* of a right, whether it be exercised *justly* (i. e. by a person who at the same time holds the right itself either absolutely or subjectively, or by one on whom its exercise has been conferred separate from the right itself), or *unjustly* (by a usurper). It would therefore be more systematically correct to treat of possession, as an exercise of a right, in the General Part, namely in the doctrine of rights.* K.

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* The doctrine of possession has formed so prominent a topic of controversy among the civilians of later times, that even on that account alone the Editor would feel it his duty to express his views on the subject, as fully as can be done in the limited space proper to a note. The dispute has reference chiefly to the *foundation* of possession, and consequently is no idle one. In connexion with this question there stands another, which touches not less nearly the very essence of possession, namely, that of its *extent;* the decision of which is of great importance, for enabling us both to arrive at those fundamental views from which the true general principles may be obtained, and to assign to the doctrine its proper place in the legal system.

There are some, or rather many, civilians who hold, in accordance with the doctrine of Savigny, that possession is a mere *fact*, and hence something juridically indifferent—as if all law did not refer exclusively to facts! *Savigny* supposes that possession, because it is a mere fact, confers no right; and that rights can accrue to a possessor only from violence or wrong done to him by others. *Gans* very properly urges in opposition to this theory that, "All the objects of law are facts: a person possesses, has property, marries, inherits. That the legal effects of one fact embrace more rights than those of another, does not alter the nature of the case; marriage is no less a fact than concubinage, a contract no less than ownership." We can speak of a mere fact without legal effects, only where no will at all exists, as in mere detention. If possession had not the germs of right in itself, in what conceivable manner could it ever become a right? Or, in order to make the question clearer by an example, How could *possessio* ever be converted into *usucapio*, if there resided not within it the nature of a right, and in this case, that of a conditional right of ownership? The *bonæ fidei possessio* is certainly not in itself the right of ownership. It is a *relative* right, which, by virtue of the lapse of time, of the long continued recognition of the possessor's subjective will, may be elevated to the dignity of an *absolute* right or right of ownership. The law is so strongly opposed to the perpetuating of uncertainties, that it prefers, even at the risk of destroying an absolute right or of sanctioning a wrong, to change an uncertain condition into one that shall be certain.

Man, in a juridical point of view (as *Zachariä* has well observed in his Vierzig Bücher vom Staate. Vol 3d. p. 97. 118 seq.) possesses nothing by birth but his body;—called to exercise dominion over the whole realm of nature, he can, if he *will*, subject *external* things to his power, to his law, as though they together with his body formed one organic whole. The rights which men may acquire over external things are either personal or real. The difference between the two is, that the (corporeal or incorporeal) object of a real right already actually exists; whereas the object of a personal right is an act due from another and which is still to be realized. A man can acquire rights to external things only through his *will* and by means of acts corresponding thereto, i. e. by appropriating them to himself with the design of subjecting them to his control and dominion.

TITLE FIRST.

IN GENERAL.

I. Nature of Possession.

1. Detention.

§ 229. ***Possession***, in its original sense, is nothing more than that condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all others. This condi-

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Possession is therefore the necessary condition upon which rights to external objects are dependent, i. e. the fact that a man *wills* that a certain corporeal or incorporeal thing which he has appropriated, shall belong to him. As long as this will is merely *subjective*, it produces only a relative right—different from the condition of an absolute right, which presupposes an *objective* will, i. e. one fully recognised by the law, or in other words one which is identified with the general will. Still even the first mentioned condition, viz. that of the enjoyment of a relative right, is recognised by the law as very important, and is attended with different weighty consequences. This condition we might term a provisional condition of right. Now in so far as possession (in its wider sense) may occur without the will to exercise any juridical dominion over an object, it is requisite that we make a distinction between physical (natural) and juridical (mental) possession; the latter of which, if it be otherwise externally announced, does not depend on physical possession. Mere corporeal having and holding without personal will, is purely a matter of fact; but as soon as this detention is quickened by the will, it begets a legal relation which we call *possession*, i. e. juridical possession. Or we may say with *Gans* (Grundlage des Besitzes. Berlin, 1839. p. 53 seqq.), "Possession is nothing but the right of personality extended to the world without. Without a subject of rights, or person, i. e. without a *will*, there would be no right. This will, although subjective, is already something substantial, something to be protected. It is therefore protected, where it is not opposed by a stronger, namely, the general will."

The late Professor *Gans* designated the will, the germ of all rights, as the legal ground of possession. Where subjective will manifests itself in the holding of a thing, a right exists, and this must be treated and protected as such. The individual will of a person is the legal ground of possession; the identity of the individual will with the general will, that of property. *Savigny* and his followers go altogether astray, when, in order to carry out their untenable theory, that possession is a mere fact, they endeavour to deduce the possessor's right to interdicts, not from his right of possession, but from a violent act or violation of right committed by him who disturbs the possession. For if the possessor has no right whatever, there can be nothing said of a violent act, or violation of right, or disturbance of possession. Moreover, the very natural question, Why has the detentor no interdicts, and why are they given only to the juridical possessor? would remain entirely unanswered, were we to explain possession as nothing but a condition of fact, and the interdicts as only a consequence of the disturber's wrong. It is also fatal for our opponents that juridical possession does not cease in consequence of ever so long a privation of detention; and that the detentor by ever so long a continuance of detention does not obtain juridical possession. Another serious objection is, that a right of representation is recognised with respect to the acquisition, preservation, and loss of possession; but how could representation be recognised without an implicit recognition of a right on the part of the principal? The detentor who claims no right for himself and has not the will to possess, has for this reason alone no protection in his own name; consequently he is secured on account of his interest in the detention, only so far as he is protected by the principal whom he represents.

The Roman jurists certainly regarded possession when quickened by will as a condition of right, as appears from many passages in the Pandects (see the Editor's Note to § 228). Some difficulty has arisen from the fact that their terminology in the doctrine of possession, being drawn from the language of common life (which in such matters

tion of fact is called *detention*, and it forms the substance of possession in all its varieties.[a] To signify mere detention, the Roman jurists

(*a*) fr. 1. pr. D. 41. 2. (Paulus) "Possessio appellata est, ut et Labeo ait, a pedibus [sedibus] quasi possessio: quia naturaliter tenetur ab eo, qui ei insistit; quam Græci κατοχήν dicunt."—*Marezoll*, Institutionen. 2d Edition. Leipsic, 1841. § 78.

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will be found more or less vague among all nations), is not every where distinct and uniform; and that consequently the context of each passage can alone determine whether they speak of detention or juridical possession. That however they made a distinction between the essence of detention, which they regarded as a fact, and that of juridical possession, which they recognised as a right, there are no good grounds to dispute. Thus, for instance, the Romans denied to one incapable of *willing*, not detention, but juridical possession; to every possessor they allowed the right of self-protection, but the interdicts and other possessory actions were granted by them to the juridical possessor alone; objects not susceptible of ownership, although subjected to detention, they regarded as incapable of juridical possession.

Thibaut impliedly considers possession to be a condition of right; yet because he omitted to adopt decidedly the *will* of the possessor as the foundation of possession, his views, though very near the truth, are not as precise as they otherwise would have been. He defines possession (System des Pand. Rechts. 7th Ed. § 290 seq. 8th Ed. § 203 seq.), in the most general sense of the word, to be the mere actual condition of the *exercise* of a right; which may be conceived of as united to the right, or as not united to it, or as existing wholly independent of the right—according as the entitled party exercises his right himself, or not, or as a party not entitled usurps the exercise of the right. "This condition of fact," he says, "is of juridical importance, inasmuch as it is protected against every one who cannot show a better right." (In pari causa melior est conditio possidentis.) This is the general and most important consequence of possession; and with respect to it he very finely observes, (in *Braun's* Erörterungen. p. 283 seq.) "Throughout the doctrine of possession, that which is essential and of general importance lies in the great idea which forms the basis of all civil security: the human, non-omniscient judge cannot at once in each single case distinguish right from wrong, and must never begin with the presumption of wrong. Consequently the mere actual condition of possession is, provisionally and while in doubt, to be held sacred by the judge. This principle holds good with regard not only to the possession of property, but also to every actual exercise of a permanent right, as e. g. freedom, citizenship, paternal power, matrimony, and jurisdiction."

Savigny, on the other hand, entirely overlooks the higher significance of possession. He says that juridically the state of possession is of no consequence, except in so far as it may establish a right to interdicts, and through the lapse of time even to a prescription. Thus he not only deprives possession of the general importance which it has with respect to all parts of the law, but even denies it a general character as regards the rights of things, making it here of consequence only in a special point of view, viz. in its relations to interdicts andprescription. This view is altogether defective and erroneous. For in saying that the natural dominion over a thing, connected with the intention of regarding it as one's own, constitutes possession, he limits the definition so as to include real rights alone, and even these only in part, whereas juridical possession applies equally to other rights.

In opposition to these ideas of *Savigny*, the late Professor *Thibaut* very strikingly urges: "Prescription is an accidental consequence of possession. Possession would retain its important character, even should the legislature abolish prescription. The assertion that possession is of interest in regard to interdicts, is a still weaker ground on which to justify the smuggling of it into the special part ot the system; for the laws have made interdicts for the sake of possession, because possession in itself is something sacred and of high importance. Consequently, if it be said that possession has been invented for the sake of interdicts, this is not a whit better than if one were to say the people are made for the kings, that they may rule over them. The place assigned to possession in the Corpus Juris is by no means decisive; because the so-called system of the Pandects, in which the most important and comprehensive doctrines are often inserted merely by way of illustration under very subordinate

use the expressions: *tenere, corporaliter possidere, esse in possessione* (§ 232 in fine.).[a] Detention, in its strict original sense, refers merely to the

(a) § 5. J. 4. 15. "*Possidere* autem videtur quisque non solum, si ipse possideat, sed et, si ejus nomine aliquis in possessione sit, licet is ejus juri subjectus non sit, qualis est colo-

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heads, does not in fact deserve the name of a system; because moreover, possession is treated of by the Romans together with prescription and interdicts for no better reason than that most of its modifications have reference to them; and lastly, because an unsystematic author prefers to treat of an entire topic in that place where he has most to say respecting it." As regards this last point, we may observe with *Gans* (l. c. p. 18), "The modern systems of Roman law should not be a mere representation of the arrangement found in the Corpus Juris, but should classify the Roman law in accordance with our reason."

The effects which give to possession a higher and more general character may all be reduced to the single one of *protection*, which is their common object. The protection enjoyed by the possessor includes: 1. the right of self-defence; 2. the right to actions and exceptions; 3. the right to judicial assistance in upholding his possession. In accordance with the last: *a.* the possessor is not required to show by what title he holds (*edere titulum*); *b.* his possession is protected until a stronger right is proved by another claimant; and, *c.* in every case of doubt, the decision must be given in his favour. Savigny, for the purpose of his argument, has denied to possession the last mentioned effect, objecting that this is rather a result of the rule of proceeding, "*In dubio pro reo.*" But this objection is clearly invalid; for the maxim, "*In dubio pro possessore,*" refers not only to the defendant, but also to the plaintiff where he is the possessor.

The true force and great importance of possession consists accordingly in this, that its primary character is that of *a subjective* or *provisional condition of right;* and this quality belongs to it with regard not only to the rights of things, but also to many other legal relations. In accordance with this general character, it belongs most properly to the General Part of the system.

The Editor will here conclude with the remark, that in his opinion, it is only by reverting to that which constitutes its *foundation*, that we can discover the complete unity which exists in the fundamental views of the Roman jurists on the subject of possession. Even *Thibaut*, who has so well understood and exhibited the general nature and high importance of possession, doubts (System. 7th Ed. § 294. 8th Ed. § 207.) whether such a uniformity can be shown, though certainly without sufficient reason. This seems to have been caused by his falling himself into the very same error which he so ably proved to have been committed by *Savigny*, viz. that of deducing the juridical character of the "exercise" of a right from its *effects* rather than from its *foundation*. That, however, the foundation of possession alone must have formed the guide of the Roman jurists in their decisions, cannot be denied; for we find them throughout the whole doctrine setting out from and returning to the distinction between a detentor and a possessor. The former, as "a possessor without will," is allowed by them, in conformity with his mere de facto possession, no other than mere self-protection; whereas to the latter, as "a possessor with will," in conformity with his juridical possession, there is always conceded juridical protection. From this point of view we can easily account for the facts, 1. that the detentor who possesses in virtue of a personal right (e. g. in consequence of a locatio conductio, mandate, deposite, &c.) enjoys no juridical protection of his own; for we cannot say of a tenant and such-like detentors, who intend to detain the thing only for a time and to enjoy merely de facto and transitorily the exercise of *another's* right, that they intend to exercise the right as their own, since they do not attribute to themselves a right in the same (non habent animum juris sibi attribuendi); and again, 2. that every juridical possessor, of whatever quality his possession otherwise may be, enjoys juridical protection. For the possessor's will to exercise a right as his own being considered as the criterion of juridical possession, it is but in conformity therewith that the juridical protection is extended in some measure even to an unjust possession and also to the possession of a pawnee (s. c. *possessio ad interdicta*); and especially that juridical protection is granted to any possessor whose will is directed to exercise a right which, when exercised justo titulo et bona fide during the whole term of prescription, will

corporeal holding of a corporeal thing; yet, it has been analogously extended so as to apply equally to the corporeal holding (i. e. the mere actual exercise) of a right.*

2. Juridical Possession.

§ 230. In order to render mere corporeal detention a *juridical possession* (*possessio*), and thereby a source of rights, the person who holds the thing must at the same time have the intention (*animus*) to possess

nus et inquilinus. Per eos quoque, apud quos deposuerit quis, aut quibus commodaverit, ipse possidere videtur. Et hoc est, quod dicitur retinere possessionem posse aliquem per quemlibet, qui ejus nomine sit in possessione. Quin etiam animo quoque solo retineri possessionem placet: id est, ut, quamvis *neque ipse sit in possessione*, neque ejus nomine alius: tamen, si non relinquendæ possessionis animo, sed postea reversurus inde discesserit, retinere possessionem videatur. Adipisci vero possessionem per quos aliquis potest, secundo libro exposuimus; nec ulla dubitatio est, quin animo solo adipisci possessionem nemo possit."—fr. 9. D. 6. 1.—fr. 7. pr. D. 39. 2.—fr. 3. § 3. D. 41. 2. (Paulus) "Neratius et Proculus, solo animo non posse nos acquirere possessionem aiunt, si non antecedat naturalis *possessio*. Ideoque si thesaurum in fundo meo positum sciam, continuo me possidere, simul atque possidendi affectum habuero, quia, quod desit naturali possessioni, id animus implet. Ceterum quod Brutus et Manilius putant, eum, qui fundum longa possessione cepit, etiam thesaurum cepisse, quamvis nesciat in fundo esse: non est verum; is enim, qui nescit, non possidet thesaurum, quamvis fundum possideat: sed et si sciat, non capiet longa possessione, quia scit alienum esse. Quidam putant, Sabini sententiam veriorem esse: nec alias eum, qui scit, possidere, nisi si loco motus sit, quia non sit sub custodia nostra; quibus consentio."—fr. 10. § 1. D. ibid. (Ulpianus) "Idem Pomponius bellissime tentat dicere: numquid, qui conduxerit quidem prædium, precario autem rogavit, non ut possideret, sed ut in possessione esset? est autem longe diversum; *aliud est enim possidere, longe aliud in possessione esse*; denique rei servandæ causa, legatorum, damni infecti, non possident, sed *sunt in possessione* custodiæ causa; quod si factum est, utrumque procedit."—fr. 24. D. ibid. (Javolenus) "Quod servus tuus, ignorante te, vi possidet, id tu non possides: quoniam is, qui in tua potestate est, ignoranti tibi non *corporalem possessionem*. sed justam potest acquirere: sicut id quod ex peculio ad eum pervenerit, possidet, nam tum per servum dominus quoque possidere dicitur: summa scilicet cum ratione; quia, quod ex justa causa *corporaliter* a servo *tenetur*, id in peculio servi est; et peculium, quod servus civiliter quidem possidere non potest, sed *naturaliter tenet*, dominus creditur possidere. Quod vero ex maleficiis apprehenditur, id ad domini possessionem ideo non pertinet, quia nec peculii causam apprehendit." fr. 49. § 1. D. ibid.—fr. 1. § 23. D. 43. 16. (Ulpianus) "Interdictum

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be transformed into an absolute right (s. c. *possessio ad usucapionem*). Owing to their narrow conception of the extent of possession, and to their deriving its juridical character from its effects instead of from its foundation, nearly all civilians refer the latter kind of juridical possession to corporeal things alone, and not to *rights* (incorporalia). But as the attempts to deduce the juridical character of possession from the *usucapio*, to which it may give rise, have been shown to be palpably erroneous, it is scarcely necessary to adduce the further argument, that where usucapio exists, juridical possession has entirely terminated, i. e. is no longer in existence as juridical possession, but has been transformed into absolute ownership; consequently, although this product of long continued possession, where it happens to occur, may fall as such (viz. as a titulus acquirendi juris) within juridical consideration, yet it cannot properly be made use of to determine the original character of juridical possession, which is owing to its foundation alone. We will avail ourselves of another opportunity (Note to § 253) to show that juridical possession applies not to the rights of property and servitude only, but equally to other rights.

* The statement that detention forms the substance of every possession, must not be understood as confining it to cases of possession alone; for detention is equally incident to ownership. And again, it may occur separately and independently of either possession or ownership: for instance, A may be the true owner of a building; B who has acquired the same *justo titulo* and *bona fide*, the juridical possessor *ad usucapionem*; and C, as tenant, the detentor.

it as *his own* property.[a] If, therefore, he merely intends to possess it as the property *of another*, and consequently to represent the owner by exercising the latter's right,[b] the Roman law says of him, "*non possidet*," i. e. he has no juridical possession; or, "*alieno nomine possidet*," i. e. he holds possession for another.*

autem hoc nulli competit, nisi ei, qui tunc, quum dejiceretur, possidebat, nec alius dejici visus est, quam qui possidet."—fr. 3. § 8. D. 43. 17. (Idem) "Creditores missos in possessionem rei servandæ causa interdicto Uti possidetis uti non posse; et merito, quia non possident. Idemque et in ceteris omnibus, qui custodiæ causa missi sunt in possessionem, dicendum est."—fr. 7. D. 43. 26. (Venuleius) "Sed et si eam rem, cujus possessionem per interdictum Uti possidetis retinere possim, quamvis futurum esset, ut tenear de proprietate, precario tibi concesserim, teneberis hoc interdicto."

(*a*) Possession and property must not, however, be mistaken for each other. One may have the juridical possession of a thing, without being its proprietor; and on the other hand, one may be proprietor, without having the possession. Hence it is said in fr. 12. § 1. D. 41. 2. "Nihil commune habet proprietas cum possessione." and in fr. 52. pr. D. ibid. "Nec possessio et proprietas misceri debent." —fr. 17. § 1. D. ibid. (Ulpianus) "Differentia inter dominium et possessionem hæc est: *quod dominium nihilominus ejus manet, qui dominus esse non vult, possessio autem recedit, ut quisque constituit nolle possidere.*. Si quis igitur ea mente possessionem tradidit, ut postea ei restituatur, desinit possidere." With respect to the definition of the *animus possidendi*, see *Savigny*, l. c. § 9. 23–25; and comp. *Guyet* in his Abhandl. p. 133. and in the Z. f. Civ. R. u. Proc. Vol. 4. p. 361.—*Warnkönig* in the Archiv Civ. Prax. Vol. 13. p. 169.—*Schröter* in the Z. f. Civ. R. u. Proc. Vol. 2. p. 233.—*Buchholtz*, Versuche. No. 8.

(*b*) Such is the case, for instance, with a commodatary, depositary, or tenant. fr. 18. pr. D. 41. 2. (Celsus) "Quod meo nomine possideo, possum et alieno nomine possidere; nec enim muto mihi causam possessionis, sed desino possidere, et alium possessorem ministerio meo facio, *nec idem est possidere et alieno nomine possidere.* Nam is possidet, cujus nomine possidetur. Procurator alienæ possessioni præstat ministerium."—fr. 30. § 6. D. ibid. (Paulus) "*Si ego tibi commodavero, tu Titio, qui putet tuum esse, nihilominus ego id possidebo.* Et idem erit, si colonus meus fundum locaverit, aut is apud quem deposueram, apud alium rursus deposuerit. Et id, per quamlibet plurium personam factum, observandum ita erit." See fr. 9. D. 6. 1. (Ulpianus) "Officium autem judicis in hac actione (scil. in rei vindicatione) hoc erit: ut judex inspiciat, an reus possideat; nec ad rem pertinebit, ex qua causa possidet. Ubi enim probavi rem meam esse, necesse habebit possessor restituere, qui non objecit aliquam exceptionem. Quidam tamen, ut Pegasus, eam solam possessionem putaverunt hanc actionem complecti, quæ locum habet in interdicto Uti possidetis, vel Utrubi. Denique ait: ab eo, apud quem *deposita* sit vel *commodata*, vel qui

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* One may well ask here: What is a source of rights? Detention, as we have already seen, produces no right. How comes it then that our Author calls juridical possession a source of rights? The answer is simple. Juridical possession presupposes a *will* (*animus*) in the possessor. This will is the so-called source of rights. Hence it would be more consistent with the nature of such possession, to call it in direct terms a *right*, i. e. a relative right proceeding from the *animus sibi habendi*, which is the source of rights.

The Author falls into another error here, when he says that the animus *domini* is necessary to constitute a juridical possession; for the pawnee, the possessor of a servitude, superficies, emphyteusis, &c., who belong to the class of juridical possessors, cannot entertain an animus domini, but only the animus *juris in re alienæ* sibi attribuendi.

In the Corpus Juris the technical terms mentioned above in the text are not employed with any degree of uniformity. This accounts for the many erroneous views which still prevail among jurists respecting this doctrine. Most commonly, however, *possessio* in its widest acceptation denotes also *detention;* in its stricter meaning, the *possessio ad interdicta: juris possessio* is used to signify the possession of a servitude; and *possessio* simply, that of an emphyteusis or superficies. Of the possessor ad interdicta it is said, *possidet;* of the possessor ad usucapionem, *civiliter possidet;* and, in contradistinction to these, of all other possessors, *civiliter non possident*, or *naturaliter tantum possident*, or *tenent tantum*.

3. Effects of Juridical Possession.

§ 231. Juridical possession conveys with it a right to the interdicts, and leads through *usucapio* to ownership.[a] 1. The right to the *interdicts* presupposes a juridical possession of some kind or other. Accordingly, even the unlawful possessor is generally entitled to use the interdicts, whenever his possession is forcibly disturbed by others.[b] 2. *Usucapio*, on the other hand, presupposes not only the existence of a juridical possession, but also that the possession has commenced in a lawful manner and *bona fide*, and that the thing possessed is subject to *usucapio*.

With respect to the interdicts it may be added, that it is not the possession which forms their foundation, but the *obligatio ex maleficio* of him who disturbs a *juridical* possession by an unlawful act.*

conduxerit, aut qui *legatorum servandorum* causa, vel *dotis*, *ventrisve nomine in possessione esset*, vel *cui damni infecti nomine non caveatur—quia hi omnes non possident*, vindicari non posse. Puto autem, ab omnibus, qui tenent et habent restituendi facultatem, peti posse."

(*a*) These effects of juridical possession are termed the *jus possessionis*, or rights arising from the possession.—*Savigny*, l. c. § 25.—Comp. *Schweppe*, Jur. Mag. No. 1. p. 45. —*Thibaut*, Civ. Abh. Vol. 1. No. 15. It will be observed that this term, *jus possessionis*, occurs in the following passages: fr. 44. pr. D. 41. 2. (Papinianus) "Peregre profecturus, pecuniam in terra, custodiæ causa condiderat: cum reversus locum thesauri in memoria non repeteret, an desiisset pecuniam possidere, vel si postea recognovisset locum, an confestim possidere inciperet? quæsitum est. Dixi: quoniam custodiæ causa pecunia condita proponeretur, *jus possessionis* ei, qui condidisset, non videri peremtum, nec infirmitatem memoriæ damnum afferre possessionis, quam alius non invasit: alioquin responsuros, per momenta servorum, quos non viderimus, interire possessionem. Et nihil interest, pecuniam in meo an in alieno condidissem, cum si alius in meo condidisset, non alias possiderem, quam si ipsius rei possessionem supra terram adeptus fuissem. Itaque nec alienus locus meam propriam aufert possessionem, cum supra terram an infra terram possideam, possideam nihil intersit."—fr. 2. § 38. D. 43. 8. (Ulpianus) "Habere eum dicemus, qui utitur, et *jure possessionis* fruitur, sive ipse opus fecit, sive ex causa emtionis vel conductionis, vel legato vel hereditate, vel quo alio modo acquisivit."—fr. 5. § 1. D. 48. 6. (Marcianus) "Si de vi et possessione vel dominio quæratur, ante cognoscendum de vi, quam de proprietate rei, Divus Pius τῷ κοινῷ τῶν Θεσσάλων, i. e. Universitati Thessalorum græce rescripsit. Sed et decrevit, ut prius de vi quæratur, quam de *jure* dominii sive *possessionis*."—const. 5. C. 7. 16. This *jus possessionis* is entirely different from the *jus possidendi* or the right to the possession of a thing, which is only a consequence of another right, and therefore should not be considered in connexion with the doctrine of possession.

(*b*) fr. 1. § 9. D. 43. 17. (Ulpianus) "Quod ait Prætor in interdicto: 'nec vi, nec clam,

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* The erroneousness of *Savigny's* theory, which has been adopted here, and according to which the possessor's right to the interdicts is said to be derived from a wrong perpetrated against him, has already been made evident in the preceding notes. We at the same time endeavoured to show that possession is not, as the great majority of jurists maintain, a mere *fact*, but a *right*, although a relative one; and that the several rights to which a possessor is entitled all spring from the right to protection inherent in possession. We shall now consider more particularly that theory which derives the right to the interdicts from a *wrong* committed against the possessor. This is obviously defective, because it does not embrace the case of an unlawful possessor, who cannot be said to have suffered a wrong from the party entitled, in case he has been deprived of his possession by the latter; and yet he undeniably would be entitled to the interdicts. *Savigny's* argument can at most have an appearance of plausibility only in cases where the interdicts actually apply after a previous wrong committed;

4. Kinds of Juridical Possession.

§ 232. In accordance with the foregoing, there are two kinds of juridical possession, viz. *possessio ad usucapionem*, and *possessio ad interdicta*.[a] The *possessio ad usucapionem* always includes a *possessio ad interdicta*;[b] but a possession of the latter description does not embrace the

nec precario, alter ab altero possideatis,' hoc eo pertinet: *ut si quis possidet vi, aut clam, aut precario, si quidem ab alio, prosit ei possessio*; si vero ab adversario suo, non debeat eum propter hoc, quod ab eo possidet, vincere; has enim possessiones non debere proficere, palam est.—fr. 2. D. ibid. (Paulus) "*Justa enim, an injusta adversus ceteros possessio sit, in hoc interdicto nihil refert*; qualiscumque enim possessor est, hoc ipso, quod possessor est, plus juris habet, quam ille, qui non possidet."—*Rudorff* in the Z. f. gesch. R. W. Vol. 7. p. 90.—*Thaden*, Ueber den Interdicten-Besitz. Hamburg, 1833. Likewise *Huschke* in his historical Treatises on Varro de re rust. 1, 2. § 9. and on Festus ad voc. Possessiones and Possessio. Heidelberg, 1835. Huschke's principal object is the examination of the origin of possessio and the original intention of the interdicts and their application to possession. On the latter point compare *Rosshirt* in the Archiv Civ. Prax. Vol. 8. No. 1. Niebuhr considers that the right of possessio ad interdicta arose from the peculiar character of the Agrarian law of the Romans. Röm. Gesch. Vol. 3. p. 14. 15.; but see *T. A. Schmidt*, Ueber das possessorische Klagerecht des juristischen Besitzers gegen seine Repräsentanten. Giessen, 1838; who, like *Rudorff* in the kritische Jahrbücher for 1840, supposes that this possession and the right to the interdicts arose from necessity, in order to prevent private violence.

(*a*) *Savigny*, l. c. § 7. 10.

(*b*) He who possesses *ad usucapionem* is entitled to the interdicts, unless the right to

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as for instance, a forcible disturbance; though even there it is groundless. *Savigny*, however, founds his theory not so much on a violation of right in general, as on a *forcible* violation. But, in the first place, the violation of possession does not always take place by force, and consequently this theory would account for the right to interdicts only in certain cases of violation, viz. where force is employed; and again, a "forcible violation of right" is after all certainly a *violation* of right, although an aggravated one as opposed to a simple violation. A violation of right can take place only where *a right previously exists*. Consequently this theory, after all, *virtually concedes a right* on the part of the possessor! But if the possessor has a right, why, in order to explain his title to the interdicts, should we resort to the fact of a wrongful violation, instead of starting at once from the true ground? We might with the same reason apply this theory to all other rights besides that of possession; since, as is well known, no right will found an action unless it has been violated. Yet no one would think of saying, "I derive my right to sue my debtor not from my claim, but from his non-payment;" or "I derive my right to the legacy bequeathed me by the testator not from his last will, but from the heir's refusal to pay it over." The ground which supports the enforcement of a right must be found in the right itself; for its criterion is that it can be enforced. That wherever the enforcement of a right comes in question, a violation of right is supposed, does not affect the matter in the least; for a violation of right, in the sense here employed, means nothing more than the condition and the time of the right's being due. Right, and the prosecution of right, are two totally different things. But this much is certain, where there is no right, none can be prosecuted. A right must therefore be established before we can speak of its prosecution. The title to prosecute dates its activity, it is true, from the violation of a right; but the occasion and the time of the prosecution are but the summons to arms, which has naught to do with the right of making war. And yet it will be evident, that it is precisely the same with the possessor's actions as with those of every other entitled party. Actions lie dormant in possession, in ownership, in every right; the violation of the right is merely the moment in which they are aroused, the means by which they are wakened into life. Hence the Roman expression, "ACTIO NATA." This does not mean that the chick produces the hen, or that a claim which one has is the product of his title to an action: it means that the *right* now produces its civil fruit, the action; and that consequently the action is born of the right.

former. It is with reference to this distinction that the following terms are employed in the Pandects: 1. The *possessio ad usucapionem*, which alone is called by the Roman jurists *possessio civilis*. Of him whose possession qualified for *usucapio* they say, *civiliter* or *jure civili possidet*.[a] Every other kind of possession, whether mere detention or juridical possession, was called *possessio naturalis*. 2. The *possessio ad interdicta*, which is expressed in the Pandects simply by the words *possessio* or *possidere*, wherever these words occur in the technical meaning of juridical possession. In contradistinction to *possessio ad interdicta*, mere detention is likewise called *possessio naturalis*,[b] in the strict sense of the term.

5. Other Divisions of Possession.

a. Possessio justa vel injusta.

§ 233. With respect to the title (*causa*, *titulus possessionis*) by which one possesses or merely holds a thing, possession is either *justa* or *injusta*.[c] *Possessio justa* is a possession which has commenced in a lawful manner and the title to which is approved by law, whether it be juridical possession or mere detention. *Possessio injusta*, on the contrary, is an unlawful possession; as in the case where it labours under either of these three *vitia possessionis*: viz. where it is obtained *vi*, *clam*, or *precario*.[d] With respect to the *causa possessionis*, this principle applies: "*Nemo sibi ipse causam possessionis mutare potest.*" This maxim appears originally to have referred only to the ancient *usucapio pro herede*; and its meaning was, that he who had begun to possess by a special title, should not be allowed to change it *mala fide* into a *possessio pro herede*.[e] But afterwards, as it seems, it was understood by the

them has been specially conferred upon another, as is the case for instance with the pawnee. fr. 16. D. 41. 3. (Javolenus) "Servi nomine, qui pignori datus est, ad exhibendum cum creditore, non cum debitore, agendum est: *quia pignori dedit, ad usucapionem tantum possidet*, quod ad reliquas omnes causas pertinet, qui accepit, possidet: adeo ut addici possit ei possessio ejus qui pignori dedit."

(*a*) fr. 3. § 15. D. 10. 4. (Ulpianus) "Sciendum est, adversus possessorem hac actione agendum: non solum eum, qui *civiliter*, sed et eum qui naturaliter incumbat possessioni. Denique creditorem, qui pignori rem accepit, ad exhibendum teneri placet." Compare with it fr. 16. D. 41. 3.—See also fr. 26. pr. D. 24. 1.—fr. 1. § 4. D. 41. 2.—fr. 1. § 9. 10. D. 43. 16.

(*b*) Besides the work of *Savigny*, the following contain the different modern views on the possessio civilis et naturalis: *T. M. Zachariä*, Institutionen des Röm. Rechts. Breslau, 1816. p. 357 seqq., and his Neue Revision der Lehre des R. R. vom Besitze. Leipsic, 1824.—*Johannsen*, Begriffs-Bestimmungen aus dem Gebiete des Civilrechts. No. 1. Heidelberg, 1831.—*Thon* in the Rhein. Mus. Vol. 4. p. 95.—*Wiederhold*, Das interd. Uti possidetis. Hanau, 1832. p. 6–11. —*Braun* zu *Thibaut*, § 291 seqq.—*Northoff* in Schunck's Jahrb. Vol. 18. p. 269–285.; and especially *Thibaut* in the Archiv Civ. Prax. Vol. 18. No. 3., who is of opinion that possessio civilis signified simply the possessio ad interdicta. Comp. *Burchardi* in the Archiv Civ. Prax. Vol. 20. No. 1. and *Savigny*, Besitz. § 10. See also *Warnkönig* in the Archiv Civ. Prax. Vol. 20. No. 2.—*Thibaut*, ibid. Vol. 23. No. 2. and *Pfeiffer* in his work cited p. 224. note *a*.

(*c*) *Savigny*, l. c. § 8.—*Brackenhöft* in Rosshirt's Z. f. Civ. u. Crim. R. Vol. 4. No. 1.

(*d*) fr. 1. § 9. fr. 2. D. 43. 17. *Brackenhöft* in the Archiv Civ. Prax. Vol. 24. No. 1.

(*e*) *Gaius*, II. 52. "Rursus ex contrario accidit, ut, qui sciat alienam rem se possidere, usucapiat: velut si *rem hereditariam*, cujus

Romans themselves to signify that a mere alteration of design could not change a *detention* into a *lawful* juridical possession,[a] or a *possessio ad interdicta* into a *possessio ad usucapionem*.[b]

b. Possessio bonæ et malæ fidei.(c)

§ 234. A possessor *bonæ fidei* is one who believes that no other person has a better right to the possession than himself.[d] A possessor *malæ fidei* is one who knows that he is not entitled to the possession.[e]

6. Nature of Juridical Possession.

a. Its Object and Subject.

§ 235. It naturally follows from the notion of juridical possession (§ 211), that there are certain things which do not admit of being possessed, and also that there are certain persons who cannot have juridi-

possessionem heres nondum nactus est, alliquis *possiderit*; nam ei concessum est, *usucapere*, si modo ea res est, quæ recipit usucapionem; quæ species possessionis et usucapionis *pro herede* vocatur. § 53. Et in tantum hæc usucapio concessa est, ut et res, quæ solo continentur, anno usucapiantur. § 54. Quare autem etiam hoc casu soli rerum annua constituta sit usucapio, illa ratio est, quod olim rerum hereditariarum possessione velut ipsæ hereditates usucapi credebantur, scilicet anno. Lex enim XII tabularum soli quidem res biennio usucapi jussit, ceteras vero anno. Ergo hereditas in ceteris rebus videbatur esse, quia soli non est, quia neque corporalis est. (Et) quamvis postea creditum sit, ipsas hereditates usucapi non posse, tamen in omnibus rebus hereditariis, etiam quæ solo teneantur, annua usucapio remansit. § 55. Quare autem omnino tam improba possessio et usucapio concessa sit, illa ratio est, quod voluerunt veteres maturius hereditates adiri, ut essent, qui sacra facerent, quorum illis temporibus summa observatio fuit, et ut creditores haberent, a quo suum consequerentur. § 56. Hæc autem species possessionis et usucapionis etiam lucrativa vocatur: nam sciens quisque rem alienam lucrifacit. § 57. Sed hoc tempore etiam non est lucrativa. Nam ex auctoritate Hadriani senatusconsultum factum est, ut tales usucapiones revocarentur. Et ideo potest heres ab eo qui rem usucepit, hereditatem petendo perinde eam consequi, atque si usucapta non esset. § 58. Sed necessario tamen herede extante ipso jure, pro herede usucapi potest." Compare with it fr. 33. § 1. D. 41. 3.—fr. 2. § 1. D. 41. 5. (Julianus) "Quod vulgo respondetur: *causam possessionis neminem sibi mutare posse, sic accipiendum est*, ut possessio non solum civilis, sed etiam naturalis intelligatur. Et propterea responsum, est: neque colonum, neque eum apud quem res deposita, aut cui commodata est, lucri faciendi causa pro herede usucapere posse."—const. 2. C. 7. 29. "Nihil pro herede posse usucapi, suis heredibus existentibus, magis obtinuit." — *Savigny*, l. c. p. 56.—*Gans*, Scholien zu Gaius. p. 263.—*De Reisach*, Diss. de antiqua juris Romani regula: *Nemo sibi ipse causam possessionis mutare potest*. Landshut, 1821.—*Schröter*, Observatt. jur. civ. Obs. 4. c. 3.—*Reinhardt*, Von der usucapio und præscriptio. p. 142.

(*a*) fr. 3. § 18. D. 41. 2.—fr. 20. D. ibid. (Paulus) "(Sed) si is, qui apud me deposuit vel commodavit, eam rem vendiderit mihi vel donaverit, non videbor causam possessionis mihi mutare, qui ne possidebam quidem."—fr. 6. § 3. D. 43. 26. (Ulpianus) "Julianus ait: eum qui vi alterum dejecit, et ab eodem precario rogavit, desinere vi possidere, et incipere precario; neque existimare, *sibi ipsum causam possessionis mutare*, quum voluntate ejus, quem dejecit, cœperit precario possidere; nam si ab eodem emisset, incipere etiam pro emtore posse dominium capere."

(*b*) fr. 1. § 2. D. 41. 6.—See *Unterholzner*, Verjährung. Vol. 1. § 100. 106. 107.

(*c*) *Tigerström*, Ueber die bonæ fidei possessio. Berlin, 1836. Comp. also his article in the Archiv Civ. Prax. Vol. 22. p. 31 seqq.

(*d*) fr. 109. D. 50. 16. (Modestinus) "*Bonæ fidei* emtor esse videtur, qui aut *ignoravit* eam rem alienam esse, aut putavit eum, qui vendidit, jus vendendi habere, puta procuratorem aut tutorem esse."—fr. 27. D. 18. 1. (Paulus) "Qui a quolibet rem emit, quam putat ipsius esse, bona fide emit. At qui sine tutoris auctoritate a pupillo emit, vel falso tutore auctore, quem scit tutorem non esse, non videtur bona fide emere, ut et Sabinus scripsit."—fr. 32. § 1. D. 41. 3. (Pomponius) "Si quid id, quod possidet, non putat sibi per leges licere usucapere, dicendum est, etiam si erret, non procedere tamen ejus usucapionem, vel quia non bona fide videatur possidere, vel quia in jure erranti non procedat usucapio."

(*e*) § 35. J. 2. 1.—fr. 38. D. 41. 3. (Gaius) "Quare ipse quidem non potest usucapere

cal possession.[a] 1. Things in which no property can be had, and which we know to be such, cannot be objects of juridical possession. For this reason all things *extra commercium* (§ 157) are excluded from possession.[b] 2. No one can have juridical possession who is incapable of holding property: and the same is true of one who can acquire property only for others, as e. g. a slave or filiusfamilias; for such a one always acquires possession not for himself,[c] but for the person to whose power he is subjected.*

b. Compossessio.

§ 236. All possession is *exclusive* from its very nature; that is to say, what is possessed by one cannot likewise be possessed by another. The same objects, therefore, cannot be in the possession of several persons at the same time, so that each of them will possess the *whole*.[d] Yet different persons may *jointly* possess the same object *in certain ideal portions;* in which case it was said by the Romans that, *plures rem pro indiviso s. pro partibus indivisis possident.* Modern jurists express it by the term *compossessio.* Several persons may also possess the same object in different respects and with different results.[e]

quia *intelligit alienum se possidere*, et ob id mala fide possidet; sed si alii bona fide accipienti tradiderit, poterit is usucapere, quia neque vi possessum, neque furtivum possidet; abolita est enim quorundam veterum sententia, existimantium etiam fundi locive furtum fieri."—*Savigny*, l. c. § 8.

(*a*) *Savigny*, l. c. § 9. p. 110–115.

(*b*) Therefore a freeman, known to be such, could not be an object of possession. fr. 23. § 2. fr. 1. § 6. D. 41. 2.—fr. 30. § 1. D. ibid. (Paulus) "Possessionem amittimus multis modis, veluti si mortuum in eum locum intulimus, quem possidebamus; *namque locum religiosum aut sacrum non possumus possidere*, etsi contemnamus religionem, et pro privato eum teneamus, sicut nec hominem liberum."—To this may also be referred everything which cannot be considered as an independent *res corporalis.*

(*c*) § 4. J. 2. 9.—fr. 24. D. 41. 2. With respect to a *peculium*, however, a filiusfamilias may have an independent possession. fr. 49. § 1. D. 41. 2.—fr. 4. § 1. D. 41. 3. (Paulus) "*Usucapere potest scilicet paterfamilias.* Filiusfamilias, et maxime miles, in castris acquisitum usucapiet."

(*d*) fr. 3. § 5. D. 41. 2. (Idem) "Plures eandem rem *in solidum* possidere non possunt. Quippe contra naturam est, ut, cum ego aliquid teneam, tu quoque id tenere videaris."—fr. 5. § 15. D. 13. 6.—fr. 19. pr. D. 43. 26. (Julianus) "Duo in solidum precario habere non magis possunt, quam duo in solidum vi possidere aut clam; nam neque justæ neque injustæ possessiones duæ concurrere possunt."—*Savigny*, l. c. § 11.

(*e*) fr. 5. D. 45. 3. (Ulpianus) "Servus communis sic omnium est, non quasi singulorum totus, sed pro partibus utique indivisis, ut intellectu magis partes habeant, quam corpore. Et ideo si quid stipulatur, vel quaque alia ratione acquirit, omnibus acquirit pro parte, qua dominium in eo habent. Licet autem ei et, nominatim alicui ex dominis stipulari, vel traditam rem accipere, ut ei soli acquirat. Sed si non uni nominatim domino stipuletur, sed jussu unius dominorum: hoc

* The principles which our Author has himself derived from the Pandects and stated in the text, furnish the best evidence of the fact, that juridical possession cannot be anything else than a right. "Persons incapable of holding property are likewise excluded from juridical possession." Why? Because they are destitute of will. "Things not subject to property are not susceptible of juridical possession." Why? Because they are withdrawn from the individual will, whether objective or subjective. Both principles apply to juridical possession only, and not to detention. With such striking analogies to the right of property, it seems inconsistent to doubt that juridical possession has the character of a right.

c. Juris quasi-possessio.

§ 237. Possession properly applies only to corporeal things; because they only are susceptible of actual detention.* But as a juridical possession is nothing more than a *de facto* exercise of the right of property, we may in a similar manner apply the term possession to the rights of servitude, when they are actually exercised with an *animus juris habendi*. Such an exercise of a *jus in re* is termed in the Roman law, *juris quasi-possessio*;[b] and the interdicts and usucapio apply to it in the same manner as to corporeal things.[c]

d. Ficta possessio.

§ 238. Sometimes one who is not actually in possession is considered by the law as the possessor.[d] This is now called *ficta possessio*, and it occurs: 1. In the case of one *qui dolo possidere desiit sive dolo posses-*

jure utimur, ut soli ei acquirat, cujus jussu stipulatus est."—fr. 25. § 1. D. 50.16. (Paulus) "Quintus Mucius ait: *partis appellatione rem pro indiviso significari*; nam quod pro diviso nostrum sit, id non partem, sed totum esse; Servius non ineleganter ait: partis appellatione utrumque significari."—fr. 8. D. 6. 1. (Idem) "Pomponius libro trigesimo sexto probat: si ex æquis partibus fundum mihi tecum communem tu et Lucius Titius possideatis, non ab utrisque quadrantem petere me debere, sed a Titio, qui non sit dominus, totum semissem. Aliter atque si certis regionibus possideatis eum fundum; nam tunc sine dubio et a te, et a Titio partes fundi petere me debere. Quoties enim certa loca possidebuntur, necessario in his aliquam partem meam esse, et ideo te quoque a Titio quadrantem petere debere. Quæ distinctio neque in re mobili, neque in hereditatis petitione locum habet: nunquam enim pro diviso possideri potest."—In the case of several compossessores therefore none of them possesses the whole thing, but each only his share.—fr. 3. § 2. D. 41. 2. (Idem) "*Incertam partem rei possidere nemo potest*, veluti si hac mente sis, ut quidquid Titius possidet, tu quoque velis possidere."—fr. 32. § 2. D. 41. 3. (Pomponius) "Incertam partem possidere nemo potest. Ideo si plures sint in fundo, qui ignorent, quotam quisque partem possideat, neminem eorum mera subtilitate possidere Labeo scribit." A case in which several persons possess the same object in different respects is, for instance, that of the pawnor and pawnee: the former possesses *ad usucapionem*, the latter *ad interdicta*. fr. 16. D. 41. 3.

(*a*) fr. 3. pr. D. 41. 2. (Paulus) "Possideri autem possunt, quæ sunt *corporalia*."—fr. 4. § 27. D. 41. 3. (Idem) "Si viam habeam per tuum fundum, et tu me ab ea vi expulceris, per longum tempus non utendo amittam viam, *quia nec possidere intelligitur jus incorporale*, nec de via quis mero jure detruditur."—*Savigny*, l. c. § 12. p. 44–47.—*Rosshirt* in the Archiv Civ. Prax. Vol. 8. p. 1.—*Albert*, Ueber den Besitz unkörperlicher Sachen. Leipsic, 1826. On the two last writings see *Huschke* in the Tüb. krit. Z. Vol. 2. p. 349 seqq.—*Schunck's* Jahrb. Vol. 3. p. 1 seqq.—*Buchholtz*, Versuche. No. 8.—*Heerwart* in the Z. f. Civ. R. u. Proc. Vol. 12. Nos. 2. 3.—*Thibaut*, System. 8th Ed. § 221.

(*b*) fr. 3. § 17. D. 43. 16.—fr. 23. § 2. D. 4. 6.—fr. 10 pr. D. 8. 5. (Ulpianus) "Si quis diuturno usu, et longa *quasi possessione jus aquæ ducendæ* nactus sit, non est ei necesse docere de jure, quo aqua constituta est, veluti ex legato vel alio modo, sed utilem habet actionem, ut ostendat, per annos forte tot usum se non vi, non clam, non precario ‖possedisse‖."

(*c*) Concerning the possession of other real rights, especially of the emphyteusis, the superficies, and pawns, see below, p. 249. note *d*.—Comp. *Thibaut*, System. 7th Edit. § 308.

(*d*) *Erxleben*, Diss. de eo, quod justum est circa fictam possessionem. Gottingen, 1778. —*Glück*, Comm. Vol. 3. p. 62. Vol. 7. p. 525. Vol. 8. p. 205.

* Detention may be conceived of as existing also in respect to incorporeal things. For instance, one who exercises a servitude or privilege belonging to another without claiming the right as his own, is a detentor. Our Author is therefore mistaken when he assumes that detention can take place only with respect to corporeal things. Again, it is erroneous to confine juridical possession to the exercise of the rights of property and servitude, since we have already seen that it relates also to the exercise of other rights.

sionem noluit admittere, that is, who has given up or not acquired the possession of a thing, from a fraudulent design to obstruct another in prosecuting his rights in regard to the same.[a] 2. In the case of him *qui liti se obtulit*, that is, who has assumed the defence of an action instituted against him on account of a thing which he does not possess at all, or of which at least he has no juridical possession.[b]

II. Acquisition of Possession.

1. General Requisites.

§ 239. The acquisition of juridical possession always requires: 1. *Apprehension* of the thing, that is some physical or corporeal act (*corpus*) by means of which he who intends to acquire, brings himself into such a relation to the thing, that he may subject it to his exclusive control. 2. This apprehension must be accompanied by a certain *intention* (*animus*) to consider the thing as his own. Wherever both exist, possession is acquired; one without the other will not suffice.[c]

(*a*) fr. 25. § 8. D. 5. 3.—Originally this only applied, according to the *Sctum Juventianum*, to the *hereditatis petitio*. fr. 20. § 6. fr. 25. § 2. 3. D. 5. 3.; but it was afterwards extended to all *actiones in rem*. fr. 27. § 8. D. 6. 1.—fr. 131. D. 50. 17. (Paulus) "Qui doli desiit possidere, pro possidente damnatur, quia pro possessione dolus est."—fr. 150. D. ibid. (Ulpianus) "Parem esse conditionem oportet ejus, qui quid possideat vel habeat, atque ejus, *cujus dolo malo factum sit, quominus possideret*, vel haberet."—fr. 157. § 1. ibid. (Idem) "Semper *qui dolo fecit, quo minus haberet*, pro eo habendus est, ac si haberet."—Concerning the consequence of the extension, fr. 25. § 9. D. 5. 3. (Idem) "(Sed) utrum is solus, qui possidet, fructus præstabit, an etiam is, qui dolo fecit, quo minus possideret? Et dicendum erit, post senatusconsultum ambos teneri. §. 10. Hæc verba senatusconsulti etiam adversus eum, qui non possidet, jusjurandum inducunt; tam enim adversus eum, qui dolo fecit, quo minus possideat, quam adversus possidentem in litem juratur." See also fr. 45. D. 5. 3.—fr. 68. D. 6. 1. (Idem) "Qui restituere jussus judici non paret, contendens non posse se restituere, si quidem habeat rem, manu militari officio judicis ab eo possessio transfertur, et fructuum duntaxat, omnisque causæ nomine condemnatio fit. Si vero non potest restituere, si quidem dolo fecit quo minus possit, is, quantum adversarius in litem sine ulla taxatione in infinitum juraverit, damnandus est. Si vero nec potest restituere, nec dolo fecit, quominus possit, non pluris, quam quanti res est, id est quanti adversarii interfuit, condemnandus est. Hæc sententia generalis est, et ad omnia, sive interdicta, sive actiones, et sive in rem, sive in personam sint, ex quibus arbitratu judicis quid restituitur, locum habet."—fr. 71. ibid.—fr. 16. § 3. D. 20. 1.

(*b*) fr. 25. 26. 27. pr. D. 6. 1. On the consequences see fr. 13. § 13. D. 5. 3.—fr. 5. pr. D. 12. 3. (Marcianus) "In actionibus in rem et in ad exhibendum, et in bonæ fidei judiciis in litem juratur. § 3. ibid. Sed in his omnibus *ob dolum solum in litem juratur*, non etiam ob culpam: hoc enim judex æstimat."—fr. 7. D. 6. 1. (Paulus) "Si is, qui obtulit se fundi vindicationi, damnatus est, nihilominus a possessore recte petitur; sicut Pedius ait."—fr. 95. § 9. D. 46. 3. (Papinianus) "Dolo fecisti, *quominus possideres*, quod ex hereditate ad alium pertinente apprehenderas. Si possessor corpus aut litis æstimationem præstitit, ea res tibi proderit, quia nihil petitoris interest; ceterum si tu ante conventus ex præterito dolo præstiteris, nihil ea res possessori proderit."—const. 2. C. 3. 19.

(*c*) fr. 3. § 1. D. 41. 2. (Paulus) "Adipiscimur possessionem *corpore* et *animo*: neque per se animo, aut per se corpore. Quod autem diximus, et animo acquirere nos debere possessionem, non utique ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet, sed sufficit quamlibet partem ejus fundi introire, dum hac mente et cogitatione sit, uti totum fundum usque ad terminum velit possidere."—See also fr. 3. cit. § 3.—fr. 8. D. ibid. (Idem) "Quemadmodum nulla possessio acquiri, nisi animo et corpore potest, ita nulla amittitur, nisi in qua utrumque in contrarium actum est."—fr. 153. D. 50. 17. (Idem) "Fere quibuscunque modis obligamur, iisdem in contrarium actis liberamur, quum quibus modis acquirimus, iisdem in contrarium actis amittimus. Ut igitur nulla possessio acquiri, nisi animo et corpore potest, ita nulla amittitur, nisi in qua utrumque in contrarium actum est."—*Savigny*. l. c. § 13.—*Despot*, Diss. de acquirenda vel amittenda possessione. Louvain, 1827.—*Thibaut*, System des Pand. R. 8th Ed. § 213.

a. *Apprehension (Corpus).*

§ 240. *Apprehension* does not exactly require a manual seizure or touching of the thing to be acquired, but rather a corporeal act of any kind whatever, on the part of him who wishes to make the acquisition, whereby he obtains the physical ability to exercise his power over the thing whenever he pleases.[a] This is the case: A. With *lands*, when he who intends to acquire possession of a piece of land steps upon it or upon a portion of it, or when he goes near it, or when it is shown to him from a distance by the last possessor with a view to deliver it to him.[b] B. With *moveable things*, 1. when one seizes the thing with his hands;[c] 2. when animals come into his traps or nets;[d] 3. when he watches close by them;[e] 4. when they are delivered to another upon his order;[f] 5. when they are brought to his domicile;[g] 6. when the keys to the box or other enclosure which contains the things are delivered to him while he is in sight of the enclosure;[h] and lastly, 7. when he affixes his mark to the thing, and this is no longer in another's possession.[i] On the contrary, the possession of a wild beast, even though fatally wounded and still pursued, is not acquired until the

(*a*) *Savigny*, l. c. § 14–17. Comp. also *Gesterding*, Irrthämer. p. 21 seqq.

(*b*) fr. 3. § 1. fr. 18. § 2. D. 41. 2. The juridical possession of land (*fundus*) which has been before in the possession of another, cannot be acquired by the mere fact of apprehension; for besides this it is requisite that the last possessor should have received notice of such apprehension, and either yielded willingly (*si vacuam tradit possessionem*) fr. 18. § 2. cit. or have been expelled forcibly by the other (*si dejicitur aut repellitur*). fr. 25. § 2. D. 41. 2. (Pomponius) "Quod autem solo animo possidemus, quæritur, utrumne usque eo possideamus, *donec alius corpore ingressus sit, ut potior sit illius corporalis possessio?* an vero, quod quasi magis probatur, usque eo possideamus, *donec revertentes nos aliquis repellat*, aut nos ita animo desinamus possidere, quod suspicemur repelli nos posse ab eo, qui ingressus sit in possessionem? Et id videtur utilius esse."—*Savigny*, l. c. § 15. 31. See also below, § 245. No. 2.

(*c*) fr. 1. § 1. D. ibid. (Paulus) "Dominiumque rerum ex naturali possessione cœpisse, Nerva filius ait, ejusque rei vestigium remanere in his, quæ terra, mari, cæloque capiuntur; nam hæc protinus eorum fieri, *qui primi possessionem eorum apprehenderint.* Item bello capta, et insula in mari enata, et gemmæ, lapilli, margaritæ in litoribus inventæ ejus fiunt, qui primus eorum possessionem nactus est."

(*d*) fr. 55. D. 41. 1.

(*e*) fr. 51. D. 41. 2.

(*f*) fr. 1. § 21. D. ibid. (Paulus) "*Si jusserim venditorem procuratori rem tradere, quum ea in præsentia sit, videri mihi traditam*, Priscus ait; idemque esse, si nummos debitorem jusserim alii dare. Non esse enim corpore et actu [tactu] necesse apprehendere possessionem, sed etiam oculis et affectu. Et argumento esse eas res, quæ propter magnitudinem ponderis moveri non possunt, ut columnas: nam pro traditis eas haberi, si in re præsente consenserint; et vina tradita videri, quum claves cellæ vinariæ emtori traditæ fuerint."—fr. 79. D. 46. 3. (Javolenus) "Pecuniam, quam mihi debes, aut aliam rem, si in conspectu meo ponere te jubeam, efficitur, ut et tu statim libereris, et mea esse incipiat; nam tum, quod a nullo corporaliter ejus rei possessio detinetur, acquisita mihi, et quodammodo manu longa tradita existimanda est."

(*g*) fr. 18. § 2. D. 41. 2.

(*h*) § 45. J. 2. 1. "Item si quis merces in horreo depositas vendiderit, *simul atque claves horrei tradiderit emtori*, transfert proprietatem mercium ad emtorem."—fr. 74. D. 18. 1. (Papinianus) "Clavibus traditis ita mercium in horreis conditarum possessio tradita videtur, si claves apud horrea traditæ sunt; quo facto, confestim emtor dominium et possessionem adipiscitur, etsi non aperuerit horrea. Quodsi venditoris merces non fuerint, usucapio confestim inchoabitur."

(*i*) fr. 14. § 1. D. 18. 6. (Paulus) "Materia emta si furto perisset, postquam tradita esset, emtoris esse periculum, respondit; si minus, venditoris; *videri autem trabes traditas, quas exitor signasset.*"—fr. 1. § 2. D. ibid. (Ulpianus) "*Si dolium signatum sit ab emtore, Trebatius ait, traditum id videri; Labeo contra. Quod et verum est*; magis enim, ne submutetur, signari solere, quam ut traditum videatur."—Comp. *Thibaut*, System des Pand. R. § 217.

animal is actually caught.[a] This also holds true of wild beasts in parks and of fish in ponds;[b] and likewise of a treasure which, though contained in a piece of land belonging to us, we do not possess, until we have found it.[c]

b. Intention (Animus).

§ 241. Apprehension by itself produces only the detention of the thing. A. In order to acquire juridical possession, apprehension must be accompanied by an *animus possidendi* or *rem sibi habendi* (§ 239). The *animus possidendi* generally consists in the intention to treat the thing apprehended as *one's own*.[d] Those therefore who are incapable of willing cannot acquire possession. Such are: 1. Moral persons.[e] 2. Children (*infantes*), who cannot acquire possession without the authority of their tutor.[f] *Impuberes*, however, i. e. those beyond the age of infancy, may acquire without such authority.[g] 3. *Furiosi* and *mente capti*.[h] B. But where one from some previous ground detains the thing already, so that apprehension is no longer necessary, the mere detention becomes transformed into juridical possession, from the moment when in addition to it the *animus possidendi* arises in him. This was called by the Romans

(*a*) § 13. J. 2. 1. "Multa enim accidere possunt, ut eam non capias."—fr. 5. § 1. D. 41. 1. (Gaius) "Illud quæsitum est: an fera bestia, quæ ita vulnerata sit, ut capi possit, statim nostra esse intelligatur. Trebatio placuit, statim nostram esse, et eo usque nostram videri, donec eam persequamur; quodsi desierimus eam persequi, desinere nostram esse, et rursus fieri occupantis; itaque si per hoc tempus, quo eam persequimur, alius eam ceperit eo animo, ut ipse lucrifaceret, furtum videri nobis eum commisisse. Plerique *non aliter* putaverunt eam *nostram esse, quam si eam ceperimus, quia multa accidere possunt, ut eam non capiamus; quod verius est.*"

(*b*) fr. 3. § 14. D. 41. 2. (Paulus) "(Nerva filius ait) feras bestias, quas vivariis *incluserimus*, et pisces, quos in piscinas conjecerimus, a nobis possideri. *Sed eos pisces, qui in stagno sint, aut feras, quæ in silvis circumseptis vagentur, a nobis non possideri*, quoniam relictæ sint in libertate naturali; alioquin etiam, si quis silvam emerit, videri eum omnes feras possidere; quod falsum est. § 15. Aves autem possidemus, quas *inclusas* habemus, aut si quæ mansuetæ factæ, custodiæ nostræ subjectæ sunt."

(*c*) fr. 3. § 3. D. ibid.—fr. 15. D. 10. 4.—*Sammet's* Hermeneutik. § 43.

(*d*) *Savigny*, l. c. § 20. 21. An exception to this rule occurs in those cases where the intention of the possessor is merely directed to the protection of his own possession, and consequently to the *jus ad interdicta:* this is the case, e. g. with the *pawnee* and *emphyteuta*. fr. 16. D. 41. 3.—fr. 35. § 1. fr. 37. D. 13. 7.—fr. 25. § 1. D. 22. 1. Such possession is at present called *derivative* possession. See *Sintenis* in the Z. für Civ. R. u. Proc. Vol. 7. p. 233. and *Büchel*, Ueber die Natur des Pfandrechts. p. 45–51.

(*e*) fr. 1. § 15. D. 47. 4. (Ulpianus) "Scævola ait: possessionis furtum fieri; denique si nullus sit possessor, furtum negat fieri; idcirco autem hereditati furtum non fieri, *quia possessionem hereditas non habet, quæ facti est et animi.* Sed nec heredis est possessio, antequam possideat, quia hereditas in eum id tantum transfundit, quod est hereditatis; non autem fuit possessio hereditatis." But juridical persons may of course acquire possession through representatives. — fr. 1. § 22. D. 41. 2. (Paulus) "*Municipes per se nihil possidere possunt, quia uni consentire non possunt.* Forum autem et basilicam, hisque similia non possident; sed promiscue his utuntur. Sed Nerva filius ait: per servum quæ peculiariter acquisierint, et possidere et usucapere posse; sed quidam contra putant, quoniam ipsos servos non possideant." —fr. 2. ibid. (Ulpianus) "*Sed hoc jure utimur, ut et possidere, et usucapere municipes possint, idque eis et per servum, et per liberam personam acquiratur.*"

(*f*) fr. 32. § 2. D. 41. 2.—const. 3. C. 7. 32. On these two passages compare *Savigny*, l. c. p. 243–255. and *Puchta* in the Rhein. Mus. Vol. 5. p. 33.

(*g*) fr. 32. pr. § 2. D. 41. 2.—fr. 1. § 3. D. ibid. The words occurring here, "si ejus ætatis sit, ut intellectum capiat," signify only: si infantia major sit. (For a refutation of this forced exposition, see Editor's note, p. 233.) —*Schweppe*, Röm. P. R. Vol. 2. § 218.

(*h*) fr. 18. § 1. D. ibid.—*Höpfner*, Comm. 8th Ed. by A. D. Weber. p. 204.

solo animo possessionem acquirere; and such acquisition may take place in a lawful or unlawful manner. It is acquired in a lawful manner, when the *animus possidendi* is founded on a *justa causa*, e. g. when a landlord sells or gives the thing[a] to his tenant; this is termed by modern jurists *traditio brevi manu.* It is done in an unlawful manner, when such *justa causa* is wanting, as e. g. when the depositary embezzles the thing deposited.[b]

2. Acquisition by Representatives.

§ 242. Possession may be acquired either *personally* or through a representative.[c] In the latter case it is necessary: 1. that the representative should apprehend the thing, and that he should do so with the intention to acquire the possession for his principal, and not for himself (*animo non sibi sed alteri possidendi*);[d] 2. that he for whom the acquisition is made should actually intend to acquire it. Therefore, the principal does not acquire it, if he knows nothing about the apprehension (*ignoranti possessio non acquiritur*), that is, if he has neither commanded it (*jussus*), nor authorized it to be made (*mandatum*), nor ratified it.[e]

(*a*) fr. 9. § 5. D. 41. 1. (Gaius) "Interdum etiam sine traditione, nuda voluntas domini sufficit ad rem transferendam, veluti si rem quam commodavi aut locavi tibi, aut apud te deposui, vendidero tibi; licet enim ex ea causa tibi eam non tradiderim, eo tamen quod patior eam ex causa emtionis apud te esse, tuam efficio."—§ 44. J. 2. 1.—fr. 9. § 9. D. 12. 1. —fr. 3. § 3. D. 41. 2.—*Savigny*, l. c. § 19.

(*b*) fr. 3. § 18–20. D. 41. 2.—fr. 6. § D. 3. 43. 26. Comp. above, § 233.

(*c*) *Pauli* sent. rec. lib. 5. tit. 2. § 1. "Possessionem acquirimus et animo et corpore; animo utique nostro: *corpore vel nostro vel alieno.*"—fr. 2. D. 41. 2.—*Savigny*, l. c. § 26.

(*d*) fr. 1. § 19. D. 41. 2. (Paulus) "Hæc, quæ de servis diximus, ita se habent, *si et ipsi velint nobis acquirere possessionem.* Nam si jubeas servum tuum possidere, et is eo animo intret in possessionem, ut nolit tibi, sed potius Titio acquirere, non est tibi acquisita possessio." — Possession therefore cannot be acquired through one who is incapable of willing. fr. 1. § 9. D. ibid. (Paulus) "Ceterum ille, per quem volumus possidere, talis esse debet, *ut habeat intellectum possidendi.* § 10. Et ideo si furiosum servum miseris, ut possideas nequaquem videris apprehendisse possessionem."

(*e*) fr. 42. § 1. D. 41. 2. (Ulpianus) "Procurator, si quidem mandante domino rem emerit, protinus illi acquirit possessionem; *quodsi sua sponte emerit, non, nisi ratam habuerit dominus emtionem.*"—fr. 1. § 5. 22. fr. 2. fr. 4. fr. 3. § 12. D. 41. 2.—fr. 31. § 3. D. 41. 3. (Paulus) "*Si servus meus vel filius peculiari, vel etiam meo nomine quid tenet,* ut ego per eum ignorans possideam vel etiam usucapiam, si is furere cœperit, donec in eadem causa res fuerit, intelligendum est, et possessionem apud me remanere, et usucapionem procedere, sicuti per dormientes quoque eos idem nobis contingeret. Idemque in colono et inquilino, per quos possidemus, dicendum est."—fr. 13. § 1. D. 41. 1. (Neratius) "Et *tutor* pupilli pupillæve, similiter ut procurator, rem emendo nomine pupilli pupillæve, *proprietatem illis acquirit etiam ignorantibus.*"—In such a case where one has given a command or mandate to apprehend possession, his ignorance of its performance will not be prejudicial to him, yet the usucapio does not commence until he is informed of it.—fr. 49. § 2. D. 41. 2. (Papinianus) "*Etsi possessio per procuratorem ignoranti quæritur, usucapio vero scienti competit,* tamen evictionis actio domino contra venditorem invito procuratore non datur, sed per actionem mandati eam cedere cogitur."—fr. 47. D. 41. 3. (Paulus) "Si emtam rem mihi procurator, *ignorante me,* meo nomine apprehenderit, *quamvis possideam, eam non usucapiam,* quia, ut ignorantes usucapiamus, in peculiaribus tantum rebus receptum est."—const. 1. C. 7. 32. The only representatives admitted in the acquisition of possession by the older law, were those subject to the power of him for whom the acquisition of possession was intended; the command given to such a representative was called "jussus," and this applied to slaves and filiifamilias. (See fr. 1. § 5. 6. 8. fr. 49. pr. D. 41. 2.—fr. 21. pr. D. 41. 1.) The later law allowed possession to be acquired also through free representatives; the ground upon which this kind of representation rests, is a "mandatum" given to the representative for the purpose of apprehending the possession. (See *Paulus*, l. c. § 2. —§ 5. J. 2. 9.—fr. 2. D. 41. 2.—fr. 20. § 2. fr.

3. Acquisition of a Juris quasi-possessio.

§ 243. *Corpus* (apprehension) and *animus* (intention) are likewise requisite for the acquisition of a *juris quasi-possessio* (§ 237).[a] In this case, the apprehension is effected by an actual exercise of the right of servitude, and the animus consists in performing as a right, the act which forms the object of the servitude.[b]

1. In order to acquire quasi-possessio, where there has been no previous grant of the servitude by agreement, it is requisite, in the case of an *affirmative* servitude, that he who claims it should at some time perform the positive act which constitutes its object, and that too neither *vi*, nor *clam*, nor *precario*, and with an intention of thus exercising a right.[c] In the case of a *negative* servitude, on the contrary, it is necessary that he whose property is to be limited thereby should have undertaken to perform an act contrary to the right of the other party, but should have acquiesced in the opposition raised to it by the latter.[d]

2. But when a servitude is conceded by agreement, the possession of it is acquired, in the case of *negative* servitudes, through the agreement itself; and in *affirmative* servitudes, by a *quasi-traditio* of them. Where the party entitled can require possession of the thing itself with respect to which the servitude has been conceded to him, such quasi-traditio is effected by a delivery of the thing itself;[e] but where the party entitled cannot claim possession of the thing itself, it is effected by merely exercising the right of servitude with the owner's knowledge.[f]

III. Loss of Possession.

1. In General.

§ 244. We have seen (§§ 239–241) that the *acquisition* of possession requires two acts, viz. a corporeal and a mental one. The *continuance* of possession, however, does not necessarily suppose a continued cor-

53. D. 41. 1.—fr. 41. D. 41. 3.—const. 1. C. 4. 27.) Possession can therefore be acquired through representatives only in the case of a *jussus* or *mandatum*.

(*a*) *Savigny*, l. c. § 44–47.—*Schweppe*, Röm. Privat-Recht. Vol. 2. § 303.

(*b*) fr. 25. D. 8. 6. (Paulus) "Servitute usus non videtur, nisi is, *qui suo jure uti se credidit*. Ideoque si quis pro via publica vel pro alterius servitute usus sit, nec interdictum, nec actio utilis competit."—fr. 7. D. 43. 19. (Celsus) "Si per fundum tuum nec vi, nec clam, nec precario commeavit aliquis, non tamen *tanquam id suo jure faceret*, sed si prohiberetur, non facturus, inutile est, ei interdictum de itinere actuque; nam ut hoc interdictum competat, jus fundi possedisse oportet."

(*c*) fr. 10. pr. D. 8. 5.—fr. 20. D. 8. 1.

(*d*) fr. 6. § 1. D. 8. 5.—fr. 1. § 2. D. 8. 3.

(*e*) As e. g. in the case of a usufruct. fr. 3. pr. D. 7. 1. (Gaius) "Omnium prædiorum jure legati potest constitui ususfructus, ut heres jubeatur dare alicui usumfructum. *Dare autem intelligitur, si induxerit in fundum legatarium, eumve patiatur uti frui.* Et sine testamento si quis velit usumfructum constituere, *pactionibus et stipulationibus* id efficere potest."

(*f*) fr. 20. D. 8. 1. (Javolenus) "Quoties via aut aliquod jus fundi emeretur, cavendum putat esse Labeo, per te non fieri, quominus eo jure uti possim, quia nulla ejusmodi juris vacua traditio esset. *Ego puto, usum ejus juris pro traditione possessionis accipiendum esse.* Ideoque et interdicta veluti possessoria constituta sunt."—fr. 11. § 1. D. 6. 2. (Ulpianus) "Si de usufructu agatur tradito, Publiciana datur; itemque servitutibus urbanorum prædiorum *per traditionem* constitutis vel

poreal relation to the thing, but may be maintained by a continued *animus possidendi* alone. As to the *loss* of possession, it is true, this must be effected by a *contrarium actum* with respect both to the corpus and animus, i. e. by an abandonment or deprivation of the detention and an abandonment of the will to possess.[a] Yet of course, where juridical possession is held without detention, or detention without juridical possession, a *contrarium actum* with respect to one alone will suffice to terminate the possession, i. e. a *contrarium actum* in the former case with respect to the animus, and in the latter case with respect to the corpus. This applies also to cases where deprivation of detention renders the will to possess of no avail.* K.

2. Through a Corporeal Act.

§ 245. As regards the corporeal relation to the thing, the continuance of possession does not depend on that immediate physical dominion over the thing which is necessary to its acquisition (§ 240), but it is sufficient if the possibility exists of reproducing such dominion at pleasure at any time.[b] Hence a man does not lose the possession of a thing which he

per patientiam, forte si per domum quis suam passus est aquæductum transduci; item rusticorum; *nam et hic traditionem et patientiam* tuendam constat."—fr. 6. § 1. D. 8. 5.—fr. 16. D. ibid. (Julianus) "Si a te emero, ut mihi liceat ex ædibus meis in ædes tuas stillicidium immittere, *et postea te sciente ex causa emtionis immissum habeam*, quæro, an ex hac causa actione quadam vel exceptione tuendus sim? Respondi: *utroque auxilio me usurum*."—fr. 1. § 2. D. 8. 3.

(*a*) *Savigny*, l. c. § 29. 30.—fr. 44. § 2. D. 41. 2. (Papinianus) "Quibus explicitis, cum de amittenda possessione quæritur, multum interesse dicam, per nosmet ipsos, an per alios possideremus. Nam ejus quidem, quod corpore nostro teneremus, possessionem amitti vel animo, vel etiam corpore, si modo eo animo inde digressi fuissemus, ne possideremus; ejus vero quod servi, vel etiam coloni corpore possideretur, non aliter amitti possessionem, quam si eam alius ingressus fuisset, eamque amitti nobis quoque ignorantibus."—fr. 3. § 6. D. ibid. (Paulus) "In amittenda quoque possessione, *affectio ejus, qui possidet, intuenda est.* Itaque si in fundo sis, et tamen nolis eum possidere, protinus amittes possessionem. *Igitur amitti et animo solo potest*, quamvis acquiri non potest."—fr. 3. § 13. D. ibid. (Idem) "Nerva filius res mobiles, excepto homine, quatenus sub custodia nostra sint, hactenus possideri, id est quatenus, si velimus, naturalem possessionem nancisci possimus. *Nam pecus, simul atque aberraverit, aut vas ita exciderit, ut non inveniatur, protinus desinere a nobis possideri*, licet a nullo possideatur; dissimiliter atque si sub custodia mea sit, nec inveniatur, quia in præsentia ejus sit, et tantum cesset interim diligens inquisitio."—fr. 8. D. 41. 2.—fr. 153. D. 50. 17. (quoted above, p. 247. note *c*.)—In some cases the possessor's will to abandon the possession is *presumed*; this is done especially where he neglects his possession, e. g. where he allows the objects of possession to remain out of his custody and unguarded. fr. 3. § 13. D. 41. 2. (quoted above, p. 252, note *a*.)

(*b*) *Savigny*, l. c. § 31.—*Thibaut*, System des Pand. R. 7th Ed. § 305.

* The remarks of Dr. Rosshirt on the continuance of possession which he inserts here, contain little more than mere repetitions of what is stated in the Compendium, §§ 245—248. In order to avoid the obscurity which our Author has introduced into § 244, the Editor has preferred to substitute for it one by himself containing a simple exhibition of the general principles of the loss of possession as stated in the Pandects. By setting out from the point of view thus gained, the reader will find no difficulty in understanding the passages quoted in the notes; which appear to have been misunderstood by modern civilians because they did not here make the requisite distinction between a juridical possessor who at the same time has the detention, and one who has not.

has once acquired, by a mere separation from it;[a] and consequently he can exercise detention also through the medium of another.[b] Possession is not terminated, until by means of some fact or other it has been made *impossible* for the possessor to exert a physical dominion over the thing (*si in contrarium actum est*). Such is the case: 1. with *moveable* things, when another gets possession of them, even though by force or secretly;[c] when we lose them;[d] when domestic animals stray away from us, when wild animals escape from our custody, and when animals that have been tamed leave off the habit of coming back;[e] 2. with an *immoveable* thing, when the possessor's dominion over it is taken away by a natural event;[f] or when he is ejected from the possession by another (*si dejicitur*). If another has taken possession of our building or land during our absence and without our knowledge, our possession is not lost until he has repelled us in our attempts to regain it.[g]

3. Through Animus.

§ 246. As regards the *animus*, it is not necessary that the possessor should be conscious of it at every moment; for the possession is not lost by *will* (*animo*), until the possessor comes to the contrary determination, and positively gives up the *animus possidendi* (*si in contrarium actum est*).[h] One who is incapable of willing cannot of course give up

(*a*) *Pauli* sent. rec. V. 2. 1.—fr. 3. § 7. D. 41. 2. (Paulus) "*Sed et si animo solo possideas*, licet alius in fundo sit, *adhuc tamen possides*."—fr. 3. § 13. fr. 44. pr. D. 41. 2.—fr. 1. § 25. D. 43. 16. (Ulpianus) "Quod vulgo dicitur æstivorum hibernorumque saltuum *nos possessiones animo retinere*, id exempli causa didici Proculum dicere; nam ex omnibus prædiis, ex quibus non hac mente recedimus, ut omisisse possessionem velimus, idem est."—The Romans called this: *Solo animo retinere possessionem*; it is now sometimes called *possessio mentalis*.

(*b*) fr. 18. pr. D. 41. 2. "Nam possidet, cujus nomine possidetur."

(*c*) fr. 15. D. 41. 2. (Gaius) "*Rem, quæ nobis subrepta est, perinde intelligimur desinere possidere*, atque eam, quæ vi nobis erepta est, sed si is, qui in potestate nostra est, subripuerit, quamdiu apud ipsum sit res, tamdiu non amittimus possessionem, quia per hujusmodi personas acquiritur nobis possessio. Et hæc ratio est, quare videamur fugitivum possidere, quod is, quemadmodum aliarum rerum possessionem intervertere non potest, ita ne suam quidem potest."

(*d*) fr. 25. pr. D. ibid. (Pomponius) "Si id, quod possidemus, *ita perdiderimus, ut ignoremus ubi sit*, desinimus possidere."

(*e*) fr. 3. § 13–15. D. 41. 2.—fr. 3. § 16. D. ibid. (Paulus) "Quidam recte putant, columbas quoque, quæ ab ædificiis nostris volant, item apes, quæ ex alveis nostris evolant, *et secundum consuetudinem redeunt*, a nobis possideri."—fr. 30. § 3. ibid. (Idem) "Item, *quod a mari vel flumine occupatum sit*, possidere nos desinimus, aut si is, qui possidet, in alterius potestatem pervenerit."

(*f*) fr. 3. § 17. D. ibid. (Idem) "Labeo et Nerva filius responderunt: desinere me possidere eum locum, *quem flumen aut mare occupaverit*."—According to the statement in some passages, he who had abandoned the thing from fear, but is not prevented from returning, is at least not regarded as a dejectus. fr. 3. § 7. D. 43. 16. But see contra: fr. 33. § 2. D. 41. 3.—*Savigny*, Besitz. 5th Edition. p. 360.—*Thibaut*, System. 8th Ed. § 218. note *p*.

(*g*) fr. 46. D. 41. 2. (Papinianus) "Quamvis saltus proposito possidendi fuerit alius ingressus, tam diu priorem possidere dictum est, *quam diu possessionem ab alio occupatam ignoraret*. Ut enim eodem modo vinculum obligationum solvitur, quo quæri adsolet, ita *non debet ignoranti tolli possessio*, quæ solo animo retinetur." fr. 25. § 2. D. ibid. (quoted above, § 240. note *b*.)

(*h*) fr. 3. § 6. fr. 17. § 1. D. 41. 2.—fr. 30. § 4. D. ibid. (Paulus) "Item quod mobile est, multis modis desinimus possidere, si *aut nolimus*, aut servum puta manumittamus, item si id, quod possidebamus, in aliam speciem translatum sit, veluti vestimentum ex lana factum."—*Savigny*, l. c. § 32.—*Thibaut*, System. 7th Ed. § 305 in fine.

the *animus;* and hence incapacity to will can neither hinder the continuance nor effect the loss of possession.[a]

4. Through both Corpus and Animus.

§ 247. Possession ceases by corporeal act and animus together, when the possessor delivers the thing over to another, with the intention that this other should possess the thing as his own (*si vacuam tradit possessionem;*)[b] or when the possessor entirely abandons it. A transfer or an abandonment of possession may however be effected through animus alone. A case where a possessor thus transfers his juridical possession to another, but reserves to himself the detention of the thing which he formerly held as his own,[c] is called by the later jurists, "*constitutum possessorium.*"

5. In case of a Representative.

§ 248. As possession may be acquired through a representative, so too it may be continued or lost by means of one.[d] For, 1. Possession may be lost *to the representative himself.* To effect this, a mere change of intention (*animus*) is not sufficient, without a corporeal act on his part in addition thereto. This corporeal act consists, in the case of moveable things, in the embezzlement of the same with a thievish design (*furtum, contrectatio*);[e] and in the case of immoveable things, in the ejection of the former possessor.[f] 2. Possession may be lost *through a representative.* This takes place in all cases where the possessor himself would have lost his possession, had there been no representation; and thus especially: *a.* In respect to moveable things, when the repre-

(*a*) fr. 27. D. 41. 2. (Proculus) "Si is, qui animo possessionem saltus retinet, furere cœpisset, non potuit, dum fureret, ejus saltus possessionem amittere, *quia furiosus non potest desinere animo possidere.*"—fr. 29. ibid. (Ulpianus) "Possessionem pupillum sine tutoris auctoritate amittere posse constat, non ut animo, sed ut corpore desinat possidere; quod est enim facti, potest amittere. *Alia causa est, si forte* ANIMO *possessionem velit amittere; hoc enim non potest.*"

(*b*) fr 33. D. 41. 2. (Pomponius) "Fundi venditor etiam si mandaverit alicui, *ut emtorem in vacuam possessionem induceret, priusquam id fieret, non recte emtor per se in possessionem veniet.* Item si amicus venditoris, mortuo eo, priusquam id sciret, aut non prohibentibus heredibus id fecerit, recte possessio tradita erit. Sed si id fecerit, quum sciret dominum mortuum, aut quum sciret heredes id facere nolle, contra erit." See also fr. 18. § 2. D. ibid.

(*c*) E. g. when in a contract of sale the agreement is made between the parties that the vendor shall remain as a tenant in possession of the house or land sold. fr. 18. pr. D. ibid.—An instance is given in fr. 77. D. 6. 1. —const. 28. C. 8. 54.—*Savigny*, l. c. § 27.—*Kienast*, Darstellung der Lehre vom Constitutum possessorium. Ingolstadt, 1819.—*Thibaut*, System. 8th Edit. § 216.

(*d*) *Savigny*, l. c. § 33.

(*e*) fr. 3. § 18. D. 41. 2. Compare fr. 1. § 2. D. 47. 2.—fr. 69. pr. D. ibid. (Celsus) "Infitiando depositum nemo facit furtum; nec enim furtum est ipsa infitiatio, licet prope furtum sit. *Sed si possessionem ejus adipiscatur intervertendi causa, facit furtum.* Nec refert, in digito habeat annulum, an dactyliotheca, quem quum deposito teneret, habere pro suo destinaverit."—An exception takes place, in case the representative who means to appropriate to himself the possession in this manner, is subject to the possessor's power. fr. 15. D. 41. 2.

(*f*) Comp. fr. 25. § 2. fr. 46. D. ibid. (See above, p. 253. note *g*.)—fr. 12. fr. 18. pr. D. 43. 16.

sentative loses them, or when they are stolen from him,[a] or when he delivers them over to another.[b] *b.* In respect to immoveable things, when he is dispossessed *by force*, in which case the possession of the former possessor will be lost *immediately*;[c] but when, either through negligence (*desidia*) or an evil intent (*dolo*), he merely permits a third party to take possession of the thing, this will not prejudice the former possessor, unless he himself has been repelled by the third party in his attempt to regain it, or unless he does not even dare to make such an attempt.[d]

On the other hand, possession is *not* lost through a representative in the following cases: viz. when he confers upon another merely the detention of the thing;[e] when he dies; when he becomes insane;[f] and when he merely quits the thing without another's taking possession of it.[g] So too possession is preserved by the representative where he retains the detention of the thing, even though the principal himself may have been ejected.[h]

TITLE SECOND.

INTERDICTS AND NOVI OPERIS NUNCIATIO.

INTERDICTS.

I. Nature of Interdicts.

§ 249. *Interdicts* among the Romans were decrees of the prætor, by means of which (in certain cases determined by the Edict) he himself directly commanded what should be done or left undone. The name *interdictum*, however, was given also to the application made to obtain the issuing of such a decree.[i] Interdicts are distinguished from *actiones* properly so-called, chiefly by the fact that in these latter the prætor did not in general proceed and decide himself on the action brought, but appointed a judex (*judicem dabat*), and gave him direc

(*a*) fr. 25. pr. fr. 15. fr. 3. § 13–16. D. 41. 2.
(*b*) fr. 33. § 4. D. 41. 3.
(*c*) fr. 1. § 22. D. 43. 16. (Ulpianus) "Quod servus, vel procurator, vel colonus tenent, dominus videtur possidere, *et ideo his dejectis ipse dejici de possessione videtur*, etiam si ignoret eos dejectos, per quos possidebat. Etsi quis igitur alius, per quem possidebam, dejectus fuerit, mihi competere interdictum, nemini dubium est."
(*d*) const. 12. C. 7. 32. The constitution cited seems to refer to no other than immoveable things, as follows from the words used in this passage: "sive servos, sive procurator, vel colonus, vel inquilinus" (comp. fr. 3. § 8. D. 41. 2.—fr. 33. § 4. D. 41. 3.); accordingly the general principle applies here: "donec revertentes nos aliquis repellat," which is stated in fr. 25. § 2. fr. 46. D. 41. 2. Contra: *Thibaut*, System. 8th Ed. § 220.
(*e*) fr. 30. § 6. D. 41. 2.—*Thibaut*, System des Pand. R. 8th Ed. § 220.
(*f*) fr. 25. § 1. D. ibid.—fr. 31. § 3. D. 41. 3.
(*g*) fr. 3. § 8. fr. 44. § 2. D. 41. 2.
(*h*) fr. 1. § 45. D. 43. 16. (Ulpianus) "Non alii autem, quam ei. qui possidet, interdictum Unde vi competere, argumentum præbet, quod apud Vivianum relatum est. si quis me vi dejecerit, meos non dejecerit, non posse me hoc interdicto (*Unde vi*) experiri: *quia per eos retineo possessionem, qui dejecti non sunt.*"
(*i*) *Gaius*, IV. 138–170.—Inst. 4. 15.—Dig. 43.—Cod. Theod. FV. 22. 23.—Cod. Just. VIII. 1–9.—*Donelli* Comm. jur. civ. XV. 32–38.—*Savigny*, Besitz. Chap. 4.—*Heffter*, Institutionen des Civilprocesses. p. 393 seqq.—Comp. also *Huschke* de Siliana causa; in his Studien des Römischen Rechts. Breslau, 1830. p. 1 seqq. p. 338 seqq.

tions for the investigation of the matter; while in interdicts, immediately upon the request of the plaintiff alone, and without previously appointing a judex (*extra ordinem*), he issued the command or prohibition which he had already announced in the Edict for cases of this sort.[a] Hence it was said in such cases: *Prætor principaliter auctoritatem suam finiendis controversiis proponit.*[b] It was not until the defendant brought forward his denial of the plaintiff's assertions, or opposed his exceptions to the plaintiff's claim, that a judex was appointed; and then the matter passed over into the usual course of proceedings in actions.[c] This distinction between *actio* and *interdictum* necessarily ceased of itself with the ancient *ordo judiciorum privatorum.* Hence in the later Roman law the *interdicta* are treated precisely in the same manner as *actiones*,[d] although they give rise to a summary proceeding.[e]

II. Kinds of Interdicts.

§ 250. The interdicts are of the following different kinds: A. According to the different nature of their contents,[f] they are: 1. either *prohibitoria*, by which one is forbidden to do or to omit to do something;[g] 2. *restitutoria*, by which one is commanded to give back something or to restore it to its former condition;[h] 3. or *exhibitoria*, by which

(*a*) For instance: VIM FIERI VETO, EXHIBEAS, RESTITUAS.

(*b*) *Gaius*, IV. 139. "Certis igitur ex causis Prætor aut Proconsul *principaliter auctoritatem suam finiendis controversiis præponit.* Quod tum maxime facit, cum *de possessione* aut quasi possessione inter aliquos contenditur. Et in summa aut jubet aliquid fieri, aut fieri prohibet. Formulæ autem verborum et conceptiones, quibus in ea re utitur, *interdicta* decretave vocantur."—*Savigny*, l. c. § 34. and in the Z. f. gesch. R. W. Vol. 3. p. 305.—*Haubold*, ibid. Vol. 3. p. 366.—*Dupont*, Disquis. in Gaii Comm. quart. p. 155. See also *Haubold*, Opusc. Edited by Wenck and Stieber. Vol. 2d. p. 327.; and Wenck in the preface p. 39.

(*c*) *Gaius*, IV. 141

(*d*) § 8. J. 4. 15. "De ordine et veteri exitu interdictorum supervacuum est hodie dicere: nam quoties extra ordinem jus dicitur (*qualia sunt hodie omnia judicia*), non est necesse, reddi interdictum, *sed perinde judicatur sine interdictis, atque si utilis actio ex causa interdicti reddita fuisset.*"—Rubr. D. 43. 1.—const. 3. C. 8. 1.

(*e*) On this point, however, the views of jurists do not agree. See the writings cited above, in notes *i* and *b*; likewise *Savigny* in the Z. f. gesch. R. W. Vol. 5. No. 1. Vol. 6. p. 229. Recht des Besitzes. 6th Edit. p. 452. note 2. and *Bethmann-Hollweg*, Civilprocess. I. p. 380 seqq.—Contra: *Thibaut* in the Archiv Civ. Prax. Vol. 10. p. 455.—*Mühlenbruch*, Entwurf des Civilprocesses. p. 233–239.—*Zimmern*, Progr. quo sensu summarium vocari possit interdictorum Romanorum judicium. Jena, 1828.—One of the principal passages referred to for justifying the summary nature of the proceedings, is const. 22. Cod. Theod. 2. 36. "Interdictum beneficio celeritatis inventum."

(*f*) *Gaius*, IV. 142.—§ 1. J. 4. 15.

(*g*) Instances are: the interdictum *de mortuo inferendo.* fr. 1. pr. D. 11. 8.—*de sepulchro ædificando.* fr. 2. § 1. D. 43. 1.—*de arboribus cædendis.* fr. 1. pr. D. 43. 27. (Ulpianus) "Ait Prætor: Quæ arbor ex ædibus tuis in ædes illius impendet, si per te stat, quominus eam adimas, tunc quominus illi eam arborem adimere sibique habere liceat, *vim fieri veto.*"—*de glande legenda.* fr. un. D. 43. 28. (Idem) "Ait Prætor: Glandem, quæ ex illius agro in tuum cadit, quominus illi tertio quoque die legere, auferre liceat, *vim fieri veto.*"—*de migrando.* fr. 1. D. 43. 32.

(*h*) For instance; the interdictum *Quod vi aut clam.* D. 43. 24. It takes place when one *forcibly* or *clandestinely* has erected or demolished a building on his own or another's ground, and thereby unlawfully injured another; its aim is, to get every thing restored to its former condition, and to obtain damages.—fr. 1. pr. § 1. D. 43. 24. (Ulpianus) "Prætor ait: *Quod vi aut clam factum est, qua de re agitur, id, quum experiundi potestas est, restituas.* § 1. Hoc interdictum *restitutorium* est, et per hoc occursum est calliditati eorum, qui vi aut clam quædam moliuntur; jubentur enim ea restituere."—*Gustav Hasse* in the Rhein. Mus. Vol. 4. p. 1–51.

one is enjoined to give up or produce a thing which he has in his possession.[a] B. With especial reference to the possession of a thing,[b] they are: 1. either such as presuppose on the part of the plaintiff a possession already actually acquired, for the protection of which they are intended; and these aim either at the protection of a possession which is merely disturbed but not yet lost (*interd. retinendæ possessionis*), or at the recovery of a lost possession (*interd. recuperandæ possessionis*);[c] 2. or such as do not presuppose a possession already acquired on the part of the plaintiff, but which are employed for the very purpose of obtaining a possession which he has not yet had (*interd. adipiscendæ possessionis*).[d]*

(*a*) Instances are: The interdictum *de liberis exhibendis.* fr. 1. pr. D. 43. 30. (Ulpianus) "Ait Prætor: Qui quæve in potestate Lucii Titii est, si is eave apud te est, dolove malo tuo factum est, quominus apud te esset, *ita eum eamve exhibeas.*"—The interd. *de homine libero exhibendo.* fr. 1. D. 43. 29. (Idem) "Ait Prætor: Quem *liberum* hominem dolo malo retines, *exhibeas.*"—The interd. *de tabulis exhibendis.* fr. 1. pr. D. 43. 5. (Idem) "Prætor ait: Quas *tabulas* Lucius Titius ad causam testamenti sui pertinentes reliquisse dicetur, si hæ penes te sunt, aut dolo malo tuo factum est, ut desinerent esse: ita eas illi *exhibeas.* Item si libellus, aliudve quid relictum esse dicitur, decreto comprehendam."—Besides the interdicts which have been mentioned here merely as instances, many others occur in the Corpus Juris, as may be seen in tit. D. 43. 6–15.

(*b*) § 2. J. 4. 15.—fr. 2. § 3. D. 43. 1.—*Gaius*, IV. 143 seq.

(*c*) It is to these two kinds of interdicts only that the term "possessio ad interdicta" (§ 231. 232) refers; for they alone are to be considered as juridical effects of possession, whence they are called by way of distinction *possessory interdicts.* Accordingly they alone belong here, where we are to speak of the protection of such possession as has been *acquired* already; while the interdicta *adipiscendæ* possessionis must be treated of under those heads to which they properly refer. See below, the interdictum Salvianum; interd. Quorum bonorum; interd. Quod legatorum.

(*d*) § 3. J. 4. 15.—*Gaius*, IV. § 144–147. —*Savigny*, Besitz. § 35.—*Thibaut*, System. 7th Edit. § 312.—*Marezoll*, Institutionen. Leipsic, 1841. § 78.

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* The interdicts that arise from possession are either *interdicta* RETINENDÆ *possessionis*, viz. the *interdictum Uti possidetis* and *Utrubi;* or RECUPERANDÆ *possessionis*, viz. the *interd. Unde vi* (according to the canon law, *actio spolii*), *de clandestina possessione*, and *de precario.* As the right to *interdicta* ADIPISCENDÆ *possessionis* is a consequence not of possession, but of other rights,—or in other words, as in them possession is not the ground, but the aim,—they do not belong to the doctrine of possession. The *interd. ret poss.*, which belong to every juridical possessor on the supposition of a forcible disturbance of his possession, viz. the *interd. Uti possidetis* for immoveable things, and *Utrubi* for moveable things,—and which are brought to obtain compensation for the damage occasioned by the disturbance, as well as for security against future disturbance,—presuppose that the plaintiff is still in possession; while the *interdicta recuperandæ poss.* take place in case the possession has been actually lost. Hence we may say that the *interd. retinendæ poss.* protect a possession that has been forcibly disturbed, and the *interd. recuperandæ poss.* one that has been taken away by force; or, that the *interd. ret. poss.* protect the possessor, while the *interd. rec. poss.* attack the possessor. To the interdicts directed to the recovery of possession belong the *interd. Unde vi* (comp. Editor's note to § 253.) and the *interd. de precario*, which latter is applicable in the case where one refuses to restore a thing which has been lent to him "subject to recall at pleasure" (*precario*); the *interd. de cland. poss.* has been rendered superfluous by the modern Roman law, as according to it a secret ejection no longer effects a loss of possession. The *interd. Uti possidetis*, as already intimated, is applied in German practice by way of analogy to personal as well as real servitudes; and no regard is paid to the special interdicts for single predial servitudes, which are mentioned in the Roman law, and of which instances have been given in § 252. note *b*.

III. Possessory Interdicts, in particular.

A. Interdicta retinendæ possessionis.

1. Requisites[a]

§ 251. In order to be entitled to these interdicts: 1. the applicant must actually have juridical possession. But it is immaterial here whether or not he has a right to possess, or whether his possession was acquired in a lawful manner or not.[b] 2. The possession must have been forcibly violated.[c] By force is here meant every act performed contrary to the will of the possessor.[d] 3. The possession itself must not have been lost thereby; for if that be the case, recourse is to be had to an *interdictum recuperandæ possessionis*.

(*a*) *Savigny*, l. c. § 37.—*Rudorff* in the Z. f. gesch. R. W. Vol. 7. p. 90.

(*b*) fr. 2. D. 43. 17. (Paulus) "Justa enim an injusta *adversus ceteros* possessio sit, in hoc interdicto (*Uti possidetis*) nihil refert; qualiscunque enim possessor, hoc ipso, quod possessor est, plus juris habet, quam ille, qui non possidet." The words "adversus ceteros" have an important meaning, as they expressly imply that the only question is, whether the possessor possesses unlawfully as far as concerns the opposite party who has disturbed him; for he cannot make use of these interdicts, in case he obtained the possession from his opponent *vi, clam*, or *precario*. See § 4. in fin. J. 4. 15.—*Gaius*, IV. § 148. "*Retinendæ possessionis* causa solet interdictum reddi, cum ab utraque parte de proprietate alicujus rei controversia est, et ante quæritur, uter ex litigatoribus possidere, et uter petere debeat; cujus rei gratia comparata sunt: *Uti possidetis et Utrubi*. § 150. Et siquidem *de fundo* vel ædibus interdicitur, eum potiorem esse Prætor jubet, *qui eo tempore, quo interdictum redditur, nec vi, nec clam, nec precario ab adversario possideat*: si vero de *re mobili*, tunc eum potiorem esse jubet, qui *majore parte ejus anni nec vi, nec clam, nec precario ab adversario possedit*; idque satis ipsis verbis interdictorum significatur." — fr. 1. § 9. D. 43. 17. (quoted p. 241. note *b*.)—fr. 3. § 10. D. ibid. (Ulpianus) "Non videor vi possidere, si ab eo, quem scirem vi in possessione esse, fundum accipiam." — fr. 53. D. 41 2. (Venuleius) "Adversus extraneos vitiosa possessio prodesse solet."

(*c*) fr. 1. pr. D. 43. 17. (Ulpianus) "Ait Prætor: UTI eas ædes, quibus de agitur, nec vi, nec clam, nec precario alter ab altero POSSIDETIS, *quominus ita possideatis, vim fieri veto*. De cloacis hoc interdictum non dabo, neque pluris quam quanti ea res erit, intra annum, quo primum experiundi potestas fuerit, agere permittam."—fr. 1. pr. D. 43. 31. (Idem) "Prætor ait: UTRUBI hic homo, quo de agitur, majore parte hujusce anni fuit, *quominus is eum ducat, vim fieri veto*."

(*d*) fr. 1. § 5. D. 43. 24. (Ulpianus) "Quid sit vi factum, vel clam factum? videamus. Vi factum videri, Quintus Mucius scripsit, *si quis contra, quam prohiberetur, fecerit*; et mihi videtur plena esse Quinti Mucii definitio. § 6. Sed et si quis, jactu vel minimi lapilli prohibitus facere, perseveravit facere, hunc quoque vi fecisse videri, Pedius et Pomponius scribunt; eoque jure utimur. § 7. Sed et si contra testationem denunciationemque fecerit, idem esse, Cascellius et Trebatius putant; quod verum est."—fr. 20. pr. § 1. D. ibid.—fr. 73. § 2. D. 50. 17. (Q. M. Scævola) "VI factum id videtur esse, qua de re quis, quum prohiberetur, fecit; CLAM, quod quisque, quum controversiam haberet habiturumve se putaret, fecit."—Instances are contained in the following passages: fr. 3. § 2. D. 43. 17. (Ulpianus) "Hoc interdictum sufficit ei, qui ædificare in suo prohibetur; etenim videris mihi possessionis controversiam facere, qui prohibes me uti mea possessione. § 3. Cum inquilinus dominum ædes reficere volentem prohiberet, æque competere interdictum Uti possidetis placuit: testarique dominum, non se prohibere inquilinum, ne habitaret, sed ne possideret. § 4. Item videamus, si actor vicini tui ex fundo tuo vites in suas arbores transduxit, quid juris sit? Et ait Pomponius: posse te ei denunciare, et vites præcidere, (idque et Labeo scribit) aut uti eum debere interdicto Uti possidetis de eo loco, quo radices continentur vitium. Nam si tibi vim fecerit, quominus eas vites vel præcidas, vel transducas, vim tibi facere videtur, quominus possideas; etenim qui colere fundum prohibetur, possidere prohibetur, inquit Pomponius."—fr. 11. D. 43. 16. (Pomponius) "Vim facit, qui non sinit possidentem eo, quod possideat, uti arbitrio suo, sive in serendo, sive in fodiendo, sive in arando, sive quid ædificando, sive quid omnino faciendo, per quod liberam possessionem adversarii non relinquit."

2. Kinds.

§ 252. Under the foregoing suppositions, the *interdicta retinendæ possessionis*, viz. the *interdictum Uti possidetis* and the *interdictum Utrubi*, will take place; the former being used to protect the possession of an immoveable thing, and the latter to protect that of a moveable thing.[a] Either of them may also be employed for the purpose of obtaining protection in the exercise of a personal servitude.[b] 1. The plaintiff with respect to these interdicts, is he who has juridical possession at the time when the proceeding is instituted; but not his heir *as such*. 2. The defendant is he who undertook to disturb it, but not his heir as such. 3. The object of the interdicts is to obtain an injunction against any further disturbance of one's possession, together with damages for the past.[c] Both interdicts are *judicia duplicia*, i. e. the plaintiff may be condemned like a defendant, if it be found that it is not his possession, but that of the defendant, which entitles to protection.[d]

B. Interdicta recuperandæ possessionis.

1. Interdictum Unde vi.[e]

§ 253. He who has been forcibly dispossessed of an immoveable thing may seek to recover the same by means of the *interdictum Unde vi*.[f] This interdict presupposes that the applicant had acquired juridi-

(*a*) § 4. J. 4. 15.—Titt. D. XLIII. 17. 31.—Cod. 8. 6.—*Savigny*, l. c. § 38. 39.—*Albert*, Ueber das interdictum *Uti possidetis* der Römer. Halle, 1824.—*Wiederhold*, Das interdictum *Uti possidetis* und die Novi operis nunciatio. Hanau. 1831.—*W. H. Puchta*, Klagen. § 52–58.

(*b*) fr. 4. D. 43. 17. *Mackeldey* holds that these interdicts do not apply to *servitutes prædiales*, because there are interdicts which were introduced with particular reference to them, as e. g. the *interd. de itinere actuque privato, de aqua quotidiana et æstiva, de rivis, de fonte, de cloacis*. But see contra, *Thibaut*, System. 7th Edit. § 623 seq. 8th Ed. § 769 seq. *Braun's* Erört. p. 543. Archiv Civ. Prax. Vol. 1. No. 7. § 2.—Comp. above, Editor's note p. 257 in fin.

(*c*) fr. 3. § 11. D. 43. 17. (Ulpianus) "In hoc interdicto *condemnationis summa refertur ad rei ipsius æstimationem. Quanti res est*, sic accipimus, quanti uniuscujusque interest, possessionem retinere. Servii autem sententia est, existimantis tanti possessionem æstimandam, quanti ipsa res est. Sed hoc nequaquam opinandum est; longe enim aliud est rei pretium, aliud possessionis." — In order to obtain a full compensation for damages, the interdict must be applied for within a year from the time of the disturbance; for after the expiration of that term the defendant is liable only so far as he has been enriched by his wrongful act. fr. 1. pr. D. 43. 17. compared with fr. 4. D. 43. 1.

(*d*) § 7. in fin. J. 4. 15.—fr. 37. § 1. D. 44. 7.—*Buchholtz*, Versuche. No. 9.

(*e*) *Cicero* pro Cæcina, and thereon *Cras*, in his Diss. qua ostenditur Ciceronem justam pro Cæcina causam dixisse. Leyden, 1769. —*Gaius*, IV. 154. "*Recuperandæ possessionis* causa solet interdictum dari, *si quis vi dejectus sit*. Nam ei proponitur interdictum, cujus principium est: UNDE *tu illum* VI *dejecisti*; per quod is, qui dejecit, cogitur ei restituere rei possessionem, si modo is, qui dejectus est, nec vi, nec clam, nec precario (*ab adversario*) possideret rem vel fundum, quo, si aut vi, aut clam, aut precario possideret, esset impune dejectus."—§ 6. J. 4. 15.—Dig. 43. 16.—Titt. Cod. VIII. 4. 5.—*Puchta*, l. c. § 59. 62.—*Thibaut* in the Archiv Civ. Prax. Vol. 1. No. 7.—*Geiger* in the Z. f. Civ. R. und Proc. Vol. 13. No. 2.—*Savigny*, Besitz. § 43.

(*f*) fr. 1. § 4–6. D. 43. 16.—fr. 1. § 3. D. ibid. (Ulpianus) "Hoc interdictum non ad omnem vim pertinet, verum ad eos, *qui de possessione dejiciuntur*. Ad solam autem atrocem vim pertinet hoc interdictum, *et ut eos tantum, qui de solo dejiciuntur*, utputa de fundo sive de ædificio; ad alium autem non pertinet. Et si quis de area dejectus sit, sine dubio interdicto locus est."—The later law seems to have extended this interdict to

cal possession,[a] and that he was deprived of it by another by means of unlawful force applied to his person.[b] This interdict is also employed in the case of a forcible deprivation of the exercise of a personal servitude in an immoveable thing,[c] but not in the case of predial servitudes.[d] 1. It may be applied for by him who possessed the thing in his own name without inquiring whether his possession was a lawful or unlawful one, and also by his heir.[e] 2. It takes place against him who is the immediate or mediate author of the ejection,[f] and against his heirs as far as they are enriched thereby,[g] but not against a third possessor of the thing.[h] 3. Its design is to restore the party ejected (*dejectus*) to the position he occupied before the ejection, and to afford compensation for the damage it occasioned.[i] 4. The right to this interdict becomes extinct after the lapse of a year from the time of the ejection; after this period, it has effect only so far as the ejector has been made richer by the ejection.[k]

ADDITION. If it be not in the defendant's power to restore the possession itself, he must pay its value (p. 259 note *c.*); he must also make compensation for all damages, positive as well as negative. In case therefore other things are lost in consequence of the ejection, he is obliged to

forcible deprivation of the possession of *moveable* things, as appears from const. 3. Cod. Theod. 4. 22.—const. 7. C. 8. 4.—§ 1. J. 4. 2.—§ 6. J. 4. 15.—*Savigny*, l. c. p. 479.—Contra: *Thibaut* in the Archiv Civ. Prax. Vol. 1. No. 7. § 1.

(*a*) fr. 1. § 9. 23. D. ibid. It is immaterial here whether the *dejectus* had acquired the possession from the ejector *vi*, *clam*, or *precario*. § 6. J. 4. 15. "Licet is ab eo, qui dejecit, vi, vel clam, vel precario possidebat."—Comp. § 251. note *b*.

(*b*) fr. 1. § 3. 21. D. 43. 16.—fr. 1. § 29. D. ibid. (Ulpianus) "Idem Labeo ait: eum, qui metu turbæ perterritus fugerit, vi videri dejectum. Sed Pomponius sit: vim sine corporali vi locum non habere; ergo etiam eum, *qui fugatus est supervenientibus quibusdam*, si illi vi occupaverint possessionem, videri vi dejectum."—fr. 3. § 6. ibid. (Idem) "Si quis autem visis armatis, qui alio tendebant, *metu hoc deterritus profugerit, non videtur vi dejectus*, quia non hoc animo fuerunt, qui armati erant, sed alio tendebant. § 7. Proinde etsi, quum armatos audisset venire, metu decesserit de possessione, sive verum, sive falsum audisset, dicendum est, non esse eum armis dejectum, nisi possessio ab his fuerit occupata."—fr. 9. pr. D. 4. 2.

(*c*) fr. 3. § 13–16. D. 43. 16.—fr. 9. § 1. D. ibid.—fr. 60. pr. D. 7. 1.—fr. 27. D. 39. 5.

(*d*) fr. 4. § 27. D. 41. 3.—*Savigny*, l. c. § 46.—*Thibaut*, l. c. § 2.

(*e*) fr. 1. § 30. D. 43. 16. (Ulpianus) "Qui a me vi possidebat, si ab alio vi dejiciatur, habet interdictum." § 44. ibid. (Idem) "Hoc interdictum et heredi et ceteris successoribus competit."

(*f*) fr. 1. § 12. D. ibid. (Idem) "Dejecisse autem etiam is videtur, *qui mandavit vel jussit, ut aliquis dejiceretur*; parvi enim referre visum est, suis manibus quis dejicist, an vero per alium. Quare etsi familia mea ex voluntate mea dejecerit, ego videor dejecisse."—fr. 3. § 10–12. D. ibid.

(*g*) fr. 1. § 48. D. ibid. (Idem) "Ex causa hujus interdicti in heredem, et bonorum possessorem, ceterosque successores in factum actio competit *in id quod ad eos pervenit*."—fr. 3. pr. D. ibid.—fr. 9. pr. D. ibid. (Paulus) "Si plures heredes sunt, unusquisque non in amplius, *quam ad eum pervenerit*, tenetur. Qua de causa interdum in solidum tenebitur is, ad quem totum pervenerit, quamvis ex parte heres sit."—Against persons whom one is in duty bound to respect and obey (as against one's parents or patron), only an actio in factum takes place. fr. 1. § 43. D. ibid. The reason why the interdict is not to be used, is, as Ulpian says here, "quia hoc interdictum atrocitatem *facinoris* in se habet." But if parents had employed a *vis armata* against their children, or a patron against his libertus, the interdict could be used; and herein is the only difference between the interd. *Unde vi* and the interd. *de vi publica s. armata* retained in the later law.

(*h*) fr. 3. § 10. D. 43. 17.—According to the canon law, it takes place against a third possessor malæ fidei. cap. 18. X. 2. 13.

(*i*) fr. 1. § 31. D. 43. 16. (Ulpianus) "Qui vi dejectus est, *quidquid damni senserit* ob hoc, quod dejectus est, *recuperare debet*; *pristina enim causa restitui debet*, quam habiturus erat, si non fuisset dejectus."

(*k*) fr. 1. pr. D. ibid.

recompense the plaintiff for such loss; and being regarded from the time of the ejection as a *debitor in mora*, he is responsible not only for *casus* (losses by accident), but also for *fructus percipiendi* (fruits which the plaintiff could have raised, if he had been in possession).* K.

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* The Roman law has undergone considerable changes with regard to possessory proceedings. Thus,

1. In the INTERDICTA RETINENDÆ POSSESSIONIS, or more properly speaking, in the Roman *interdictum Uti possidetis*, we now make use of a *processus possessorius summariissimus* (called simply *summarium* or *summariissimum*, scil. *judicium*) and a *processus possessorius ordinarius* (called *ordinarium*). The former, although not known to the Roman law, is mentioned by the glossator Baldus, and was brought into use as early as the 13th century in Italy, France, Germany, and other countries of Europe, in order to prevent parties from taking the law into their own hands, by affording a process by which their disputes might be determined as speedily as possible. This summarium is employed in the *interdicta retin. possess.*, only where the plaintiff has juridical possession of a right or of an immoveable thing, and has not acquired it from the defendant by a defective title: but if he has done so, the defendant must be prepared to prove the defect at once; since the duty of the judge is here to decide the dispute as to possession in the speediest manner and only provisorily, and consequently upon a less exact investigation into the defects of the possession, than is otherwise made in the case of interdicts; on which account the defeated party can always resort to the proper action of interdict (the *ordinarium*). The *ordinarium* therefore, whose purpose is to settle definitively the question of possession, forms the first proper action of interdict. For if the plaintiff was protected in his possession by the judge, because the defendant could not immediately prove the defectiveness of the possession, the latter can now require a more exact examination of his rights and at the same time a reversal of the previous decision. In the *summarium*, where all depends on the latest possession, on the newest possessory act, protection is often afforded to mere detention; because the principal object, the preventing of violent proceedings, requires speedy action. The *ordinarium* on the contrary is regarded as an entirely *nova causa*, and its object is to ascertain the *better* right of possession; and here accordingly more circumstantial proofs are admitted: yet the alledging and showing of a right of ownership or other real right, if it be not done merely *pro colorandæ possessione* (with a view to elucidate one's right of possession), is admissible in this possessory suit only where proofs can be adduced which furnish immediate evidence; otherwise recourse must be had to a new process, the so-called *petitorium*. In the *summarium*, the last indubitable *factum quietæ possessionis* preceding the disturbance is decisive; in the *ordinarium*, on the contrary, the *better* possession is protected, and hence e. g. that of the plaintiff, if he can prove that his possession is older, or that he has received it from the defendant under a lawful title, or that his title to the possession is stronger than the defendant's.

2. Important changes have also been effected in the Roman INTERDICTA RECUPERANDÆ POSSESSIONIS, or, more properly speaking, in their *interdictum Unde vi*. Thus, the canon law has diminished the requisites of the latter and very much extended its operation, by introducing an entirely new legal remedy under the name of *remedium spolii*, which may be employed in a twofold form, either as an action (*actio spolii*) or as an exception (*exceptio spolii*). The *actio spolii* is indeed founded on the Roman *interd. Unde vi*, with the extent already given to the latter by the Roman law (comp. p. 259, note *f.*); the canon law however has extended it still further, by granting the action even where the possessor or detentor has been deprived without violence of the possession or quasi-possession (can. 3. C. 3. qu. 1. "aut dolo, aut violentia malorum, aut per quascunque injustas causas"); and by granting it unconditionally against the heirs and even against the third possessor of the thing spoliated (taken by an unlawful act), provided that the latter was knowing to the spolium of his predecessor, and also against persons whom we are in duty bound to respect (cap. 2. 7. 15. X. 2. 13.). It also introduced the *exceptio spolii* unknown to the Roman law. This dilatory exception is very much favoured, *a.* since the *spoliatus* can oppose it to every action of the spoliator, even to

2. Interdictum de clandestina possessione; and, 3. Interd. de precario.

§ 254. On essentially the same principles were founded the *interdictum de clandestina possessione*, formerly employed in the case where one had been *secretly* deprived of the possession of a moveable thing, but which has been abolished by the later law (§ 240. note *b*.); and the *inter-*

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one that has not the remotest connexion with the *spolium*; (he is entitled to oppose this exception even in the latter part of the proceedings, although in such case he must furnish the proofs within fifteen days from the time of announcing them; it is only when he introduces the exception as late as the time of execution, that it must be made liquid on the spot—*in continenti*;) *b*. since the *spoliatus* may even refuse altogether to answer upon the action, until the *spolium* is restituted; *c*. since the exception is exempt from limitation, until full restitution is made of the thing spoliated (cap. 2. pr. X. 2. 10.—cap. 1. pr. in 6to. 2. 5.).

In order to show the wide field over which the *remedium spolii* extends, we will, according to promise (Editor's note, p. 239), define those rights which by their nature admit of a separation of possession from the right itself. Possession in its *origin* has respect only to *corporeal* things (fr. 3. pr. D. 41. 2. "Possideri autem possunt quæ sunt corporalia."); but by means of abstraction, it is analogously extended also to incorporeal things. Hence it ensues, that there exists also with respect to *incorporeal* objects a detention, as well as a *possessio ad interdicta* and *ad usucapionem*. For in the first place, the quasi-possessor either stands in a mere relation of fact to the object of his possession, or he has the intention of exercising a right, whether this be effected by usurpation or on a legal ground: and in the next place, the quasi-possession or the possession of rights, is not held less sacred than the possession of things, and consequently the possessor is not less entitled to protection against disturbance in the exercise of his right, as well as in his petitory claims to the same, so far as he is not opposed herein by a stronger right. Our Author assumes, with Savigny and his followers, that possession was applied by the Romans only to *corpora* and *servitutes*. It is acknowledged that the Romans in the case of pawn and emphyteusis speak of a possession; and Savigny and those of his school, as also our Author (§ 241. note *a*.), have admitted this; only as the possessor here possesses the thing itself, this possession is rightly regarded not as incorporeal, but as corporeal. But the sphere of possession evidently extends *still* further. Some jurists have allowed that the Roman law acknowledges a quasi-possession in the *superficies* and the *status servorum* (in the latter of which it may take place on the part of freemen with respect to *ingenuitas*, on that of slaves with respect to the state of freedom, and on that of masters with respect to slavery). But even such a restriction to the *status libertatis* can by no means be justified from the Roman law; for quasi-possession is unquestionably extended also to the *status civitatis* (citizenship) and the *status familiæ* (paternal power and marriage). To rights of obligation, on the other hand, possession does not extend; since they produce a relation between certain persons only, and moreover they admit of no separation of the right from the exercise thereof. In Germany, the province of quasi-possession has been extended still further; since with respect to the many predial rights which are connected with the feudal system, as those of the *census* (lease-rent), *decimæ* (tithes), *operæ* (personal services), and *jura bannaria* (rights of compulsion and prohibition), a possession has been adopted analogous to the Roman quasi-possessio. And the same is the case with those species of rights which, by virtue of the constitution of church and state which dates from the middle ages, are granted to lands and corporations, as e. g. the *jurisdictio patrimonialis* (court-baron), the *jus patronatus* (advowson), &c. Let us assume, for instance, that the lord of the manor, A, or the convent B has a right of tithe over the whole extent of land on one side of a certain hill, but ascertains that this right was at one time exercised over a field on the other side of the hill, now belonging to farmer C. A or B accordingly sends a tithing-man to collect the tithes also from C's field. C, being informed of this by his predial neighbour, hastens to his field, and finds the collector engaged in taking a sheaf out of every stack of corn. He protests against this proceeding, and threatens that if, instead of leaving his land immediately, they put a single sheaf on the wagon or touch ano-

dictum de precario, which applies to the case where one has granted *precario* to another the use of a thing or the exercise of a servitude; and the latter refuses to restore the thing or to abstain from the exercise of the servitude on the demand of the grantor.[a]

NOVI OPERIS NUNCIATIO.

A. In general.

§ 255. As a general rule, a party is not allowed to take the enforcement of his rights into his own hands.[b] Still he is not prohibited from

(*a*) Dig. 43. 26. and especially fr. 2–4. fr. 15. § 2. ibid.—const. 2. C. 8. 9.—*Pauli* sent. rec. lib. 5. tit. 6. § 10. 11. "Redditur interdicti actio, quæ proponitur ex eo, *ut quis quod precario habet restituat*. Nam et civilis actio hujus rei, sicut commodati, competit; eo vel maxime, quod ex beneficio suo unusquisque injuriam pati non debet. § 11. Precario possidere videtur, non tantum qui per epistolam vel quacumque alia ratione hoc sibi concedi postulavit, sed et is qui nullo voluntatis indicio, patiente tamen domino, possidet." —*Savigny*, l. c. § 42.—*Puchta*, l. c. § 63.

(*b*) fr. 176. pr. D. 50. 17. (Paulus) "Non

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ther stack, he will drive them off his land by force. Hereupon the tithing-man with his assistants retires, and his principal brings an action at once before the court, and prays *in summariissimo* for protection in the possession. But his complaint of disturbance in the latest possession is evidently groundless; for his was no *actus quietæ possessionis;* on the contrary, the attempt to collect the tithes was a very dubious act of quasi-possession. Being defeated here, the pretender to the tithes has recourse to the *ordinarium*. Here he succeeds by means of witnesses in proving that for a series of years the tithes were collected from C's predecessors in the property, quietly and without opposition: this proof C may not be able to invalidate, neither may he be able to prove on the spot the right of exemption from tithe-paying on which he relies, because the documents relating to it have been mislaid. He is therefore condemned *in ordinario*, retaining at the same time his petitory claims. Subsequently he discovers the documents, and finds that at an earlier period a suit brought on account of this right of tithe was decided in favour of exempting the land from the burthen. Thus supported, he brings a suit *in petitorio*, and his right of exemption is acknowledged, and the lord or the convent defeated.

To satisfy the minds of those who, after all we have said in different places, may still be at a loss to know how we classify juridical possession as a right, we will here observe that thus much is evident, viz. that it is to be regarded not as a personal, but as a *subjective real* right. The objection that possessory actions are granted not against every third person, but only against the disturber or ejector, if it be meant thereby to dispute its character as a real right, is perfectly futile; since this disturber or ejector, or any stranger who obtained possession after the ejection has taken place, is precisely the party designated by the term "every third person." This expression denotes simply every person with whom we otherwise do not stand in any legal relation whatever; for this is what essentially distinguishes real from personal rights, which latter as a general rule operate on the contracting parties alone, and have no effect on other persons. It is manifest that every one with whom we otherwise stand in no legal relation whatever, may be a disturber or ejector, or may obtain the possession we have lost; yet in all these cases he who is or at least was in possession is entitled to possessory or petitory remedies against such persons, inasmuch as their right to the possession is not equal to his. Suppose now we take, as the surest standard of comparison, the most absolute of all real rights, that of property; here it is at once evident that the proprietor, whose real right consists in his ability to sue every third person, cannot bring an action against any member of the community he chooses, in order to obtain satisfaction for the damage or invasion of his property or to recover possession of it, but can attack the offender or possessor alone. The offender, invader, or possessor,—the third person whom the proprietor has a right to sue,—corresponds to the disturber, ejector, or him who has obtained the dominion of the thing in the case of possession.

defending his own person, or the things in his possession, from violent unlawful attacks on the part of others,[e] provided he employs no more force than is requisite for repelling the aggressor (*moderamen inculpatæ tutelæ*).[b]

B. Its Nature.

§ 256. A remarkable kind of lawful self-defence in possession is the *novi operis nunciatio*.[c] It arises in the following manner: When one begins to build up or to pull down something (*opus novum facere*), whether he has the right to do so or not,[d] he who fears that his rights will be impaired thereby, may extrajudicially hinder the completion of the work[e] in different ways, viz: 1. *By forcible acts* (so-called *nunciatio realis*).[f] Such acts are not only permitted to one who wishes to

est singulis concedendum, quod per magistratum publice possit fieri, ne occasio sit majoris tumultus faciendi."—§ 1. J. 4. 2.—§ 6. J. 4. 15.—fr. 12. § 2. fr. 13. D. 4. 2.—const. 7. 10. C. 8. 4. const. 34. C. 4. 65. const. 9. C. 4. 10.—Nov. 60. c. 1.

(*a*) fr. 45. § 4. D. 9. 2. (Paulus) "Qui, quum aliter tueri se non possent, damnum culpa dederint, innoxii sunt; *vim enim vi defendere omnes leges omniaque jura permittunt*. Sed si defendendi mei causa lapidem in adversarium misero, et non eum sed prætereuntem percussero, tenebor lege Aquilia; illum enim solum qui vim infert, ferire conceditur, et hoc *si tuendi duntaxat*, non etiam ulciscendi causa factum sit."—fr. 4. D. ibid. (Gaius) "Itaque si servum tuum latronem insidiantem mihi occidero, securus ero; *nam adversus periculum naturalis ratio permittit se defendere*. § 1. Lex duodecim tabularum furem noctu deprehensum occidere permittit, ut tamen id ipsum cum clamore testificetur; interdiu autem deprehensum ita *permittit occidere, si is se telo defendat*, ut tamen æque cum clamore testificetur."—fr. 1. § 27. D. 43. 16. (Ulpianus) "*Vim vi repellere licere*, Cassius scribit; idque jus natura comparatur. Apparet autem, inquit, ex eo, *arma armis repellere licere*."—fr. 3. § 9. D. ibid. (Idem) "Eum igitur, qui cum armis venit, possumus armis repellere, sed hoc confestim, non ex intervallo; dummodo sciamus, non solum resistere permissum, ne dejiciatur, sed et si dejectus quis fuerit, eundem dejicere non ex intervallo, sed ex continenti posse."—See also fr. 3. D. 1. 1.

(*b*) fr. 5. pr. D. 9. 2. (Ulpianus) "*Sed et si quemcunque alium ferro se petentem quis occiderit, non videbitur injuria occidisse*, et si metu quis mortis furem occiderit, non dubitabitur, quin lege Aquilia non teneatur. *Sin autem, quum posset apprehendere, maluit occidere, magis est, ut injuria fecisse videatur*; ergo et Cornelia tenebitur."—const. 1. C. 8. 4. "Recte possidenti ad defendendam possessionem, quam sine vitio tenebat, *inculpatæ tutelæ moderatione* illatam vim propulsare licet."—*Hencke*, Handbuch des Crim. Rechts. Vol. 1. § 36. 37.

(*c*) Dig. 39. 1. Dig. 43. 24.—Cod. 8. 11.—*Kämmerer* de operis novi nunciatione. Heidelberg, 1807.—*Reinhardt*, Erläuterungen des Pandektentitels de operis novi nunciatione. Stuttgart, 1820.—*Engelhardt* de operis novi nunciatione. Leipsic, 1821.—*Gust. Hasse* de novi operis nunciatione. Bonn, 1829. and on the same subject more at large in the Rhein. Mus. Vol. 3. p. 579.—*Wiederhold*, Das interd. Uti possidetis und die novi operis nunciatio. Hanau, 1831.—*W. H. Puchta*, Klagen. § 155.

(*d*) fr. 1. pr. D. 39. 1. (Ulpianus) "Hoc edicto permittitur, ut, *sive jure, sive injuria opus fierit, per nunciationem inhiberetur*, deinde remitteretur prohibitio hactenus, quatenus prohibendi jus is, qui nunciasset, non haberet. § 7. ibid. Sed si is, cui opus novum nunciatum est, ante remissionem ædificaverit, deinde cœperit agere, jus sibi esse ita ædificatum habere: Prætor actionem ei negare debet, et interdictum in eum *de opere restituendo* reddere."

(*e*) For after the building has once been completed, he can resort only to the interdictum QUOD VI AUT CLAM. fr. 1. § 1. D. ibid. (Idem) "Hoc autem edictum remediumque operis novi nunciationis *adversus futura opera inductum est, non adversus præterita, hoc est adversus* ea, quæ nondum facta sunt, ne fiant. Nam si quid operis fuerit factum, quod fieri non debuit, cessat edictum de operis novi nunciatione, et erit transeundum ad interdictum QUOD VI AUT CLAM factum erit, ut restituatur, et QUOD IN LOCO SACRO RELIGIOSOVE, ET QUOD IN FLUMINE PUBLICO RIPAVE PUBLICA factum erit; nam his interdictis restituetur, si quid illicite factum est." (p. 256, note *h*.)—*Puchta*, *l. c.* § 156.

(*f*) Such are, the expelling of the workmen, the destroying of the work which has been commenced and, as a symbolic act, the throwing of a stone against the building (*jac*

defend himself in possession, but in many cases they are even necessary in order to prevent the loss of possession. 2. *Without forcible acts*, when he protests before the workmen on the spot,[a] or before some one present who represents the owner,[b] against the prosecution of the work, and forbids the same. This latter kind is a *novi operis nunciatio* properly so-called, and is in fact the only one to which the Romans applied the term; and not only is the owner of the thing entitled thereto, but also every one else who, on account of a real right, is interested in the discontinuance of the *opus novum*.[c]

C. *Its Effect.*

§ 257. The effect of the nunciation is, that the party interdicted must desist from completing the work until the matter has been settled in due course of law. If he should proceed with the work notwithstanding, the nunciator may apply for an *interdictum de opere novo demoliendo vel restituendo* for the immediate demolition or restoration of the work.[d] But if there be danger in delay, or if the interdicted party

tus lapilli). fr. 5. § 10. D. ibid. (Ulpianus) "Meminisse autem oportebit, quoties quis in nostro ædificare, vel in nostrum immittere vel projicere vult, melius esse, eum per Prætorem, *vel per manum, id est lapilli jactum prohibere*, quam operis novi nunciatione. Ceterum operis novi nunciatione possessorem eum faciemus, cui nunciaverimus. At si in suo quid faciat, quod nobis noceat, tunc operis novi nunciatio erit necessaria. Et si forte in nostro aliquid facere quis perseveret, æquissimum erit, interdicto adversus eum QUOD VI AUT CLAM, aut UTI POSSIDETIS uti." —fr. 6. § 1. D. 8. 5.—*Du Roi* de jactu lapilli. Helmstedt, 1782.

(*a*) fr. 5. § 2. D. 39. 1. (Idem) "Nunciationem autem *in re præsente* faciendam, meminisse oportebit, id est *eo loci, ubi opus fiat*, sive quis ædificet, sive inchoet ædificare." —See also fr. 5. § 4. D. ibid.

(*b*) fr. 5. § 3. ibid. (Idem) "*Nunciari autem non utique domino oportet*; sufficit enim in re præsente nunciare ei, *qui in re præsente fuerit, usque adeo, ut etiam fabris vel opificibus, qui eo loci operantur, opus novum nunciari possit.* Et generaliter ei nunciari opus novum potest, qui in re præsente fuit *domini operisve nomine*. Neque refert quis sit iste, vel cujus conditionis, qui in re præsente fuit. Nam et si servo nuncietur, vel mulieri, vel puero vel puellæ, tenet nunciatio; sufficit enim, in re præsente operis novi nunciationem factam sic, ut domino possit re-nunciari."

(*c*) fr. 1. § 3. D. 43. 25. (Ulp.) "Jus habet novum opus nunciandi, qui *aut dominium aut servitutem habet*."—fr. 1. § 5. D. 39. 1. (Idem) "Adversus absentes etiam, et invitos, et ignorantes, operis novi nunciatio procedit."—fr. 3. § 3. D. ibid. (Idem) "Si ego *superficiarius* sim, et opus novum fiat a vicino, an possim nunciare? Movet, quod quasi inquilinus sum. Sed Prætor mihi utilem in rem actionem dat, et ideo et servitutum causa actio mihi dabitur, *et operis novi nunciatio debet mihi concedi*."—fr. 8. pr. D. ibid. (Paulus) "Non solum proximo vicino, sed etiam superiori opus facienti *nunciare opus novum potero; nam et servitutes quædam* intervenientibus mediis locis, vel publicis vel privatis, *esse possunt*."—fr. 15. D. 8. 2. (Ulpianus) "Inter servitutes, NE LUMINIBUS OFFICIATUR, et NE PROSPECTUI OFFENDATUR, aliud et aliud observatur: quod in prospectu plus quis habet, ne quid ei officiatur ad gratiorem prospectum et liberum; in luminibus autem, ne lumina cujusquam obscuriora fiant. Quodcunque igitur faciat ad luminis impedimentum, prohiberi potest, si servitus debeatur, *opusque ei novum nunciari potest*, si modo sic faciat, ut lumini noceat."—fr. 6. § 7. D. 8. 5. (Idem) "Parietem autem meliorem quidem, quam in servitute impositum est, facere licet, deteriorem si faciat, aut per hanc actionem (scil. confessoriam) aut *per operis novi nunciationem prohibetur*."—fr. 14. D. 39. 1. (Julianus) "*Qui viam habet, si opus novum nunciaverit* adversus eum, qui in via ædificat, *nihil agit*, sed servitutem vindicare non prohibetur."—*Glück*, Comm. Vol. 10. p. 219 seqq.

(*d*) fr. 1. § 7. D. 39. 1.—fr. 20. D. ibid. (Ulpianus) "Prætor ait: 'Quem in locum nunciatum est, ne quod opus fieret, qua de re agitur, *quod in eo loco* ante, quam nunciatio missa fuerit, aut in ea causa esset, ut remitti deberet, *factum est, id restituas*.' § 1. Interdictum hoc proponitur ex hujusmodi causis.

should insist upon it, he will be permitted to continue and complete the work, on giving a *cautio de eventualiter demoliendo aut restituendo;* and if he has given this security or the nunciator has refused to receive it, he may protect himself against disturbance in the prosecution of his work by means of an *interdictum prohibitorium.*[a]

The effect of the nunciation ceases: 1. when security is given;[b] 2. when the nunciator dies; 3. when he alienates the thing;[c] and, 4. when he or the judge permits the interdicted party to carry on the work (*remissio*).[d] *

CHAPTER II.

PROPERTY.

§ 258. A great diversity of opinion has always prevailed respecting the original ground of property. The ancients very generally held property to be the gift of the Deity; and this explains many of their legal views, especially with regard to property in land and the succession to it. The nations of modern Europe, as early as the middle ages, regarded property as an institution of the positive law; and with respect to the soil, all the territory was considered as belonging to the state, and individual property was held therein by single members of

Edicto expressum est, ne post operis novi nunciationem quidquam operis fiat, antequam vel nunciatio remissa sit, vel vice nunciationis remissæ satisdatio de opere restituendo fuerit interposita. Qui igitur facit, etsi jus faciendi habuit, tamen contra interdictum Prætoris facere videtur, *et ideo hoc destruere cogitur.* § 2. Sive autem vacuus locus sit, ubi nunciatum est, sive ædificatus, æque huic interdicto locus erit."—fr. 21. § 1. D. ibid. (Idem) "Si quis autem vult post opus novum nunciatum impune ædificare, offerre debet satis nunciatori. Quod si fecerit, utrique consultum est, tam ei qui nunciavit, quoniam cautum habet de opere restituendo, quam ei, cui nunciatum est, quia molitio ejus non impeditur; antequam enim caveat, quidquid ædificaverit, *interdicto restitutorio* destruere compellitur."

(*a*) fr. 5. § 17. D. 39. 1. (Idem) "Si is, cui nunciatum erit, ex operis novi nunciatione satisdederit repromiserive, aut per eum non fiet, quominus boni viri arbitratu satisdet repromittatve, perinde est, ac si operis novi nunciatio omissa esset. *Habet autem hoc remedium utilitatem;* nam remittit vexationem ad Prætorem veniendi, et desiderandi, ut missa fieret nunciatio."—fr. 8. § 2 and 4. D. ibid. (Paulus) "Si, cum possem te jure prohibere, nunciavero tibi opus novum, *non aliàs ædificandi jus habebis, quam si satisdederis.* § 4. Sciendum est, facta operis novi nunciatione eum, cui nunciatum est, abstinere oportere, *donec caveat,* vel donec remissio nunciationis fiat; tunc enim *si jus* ædificandi habet, recte ædificabit."

(*b*) fr. 20. § 9. 10. D. ibid.—Comp. *Dirksen.* Observationes ad selecta Legis Gallisæ Cisalpinæ capita. p. 44.

(*c*) fr. 5. § 17. fr. 8. § 2. 4. fr. 20. fr. 21. D. 39. 1.

(*d*) fr. 8. § 6. D. 39. 1. (Paulus) "Morte ejus, qui nunciavit, exstinguitur nunciatio, sicut alienatione, quia his modis finitur jus prohibendi."—fr. 8. § 7. ibid. (Idem) "Quodsi is, cui opus novum nunciatum erat, decesserit, vel ædes alienaverit, non exstinguitur operis novi nunciatio, idque ex eo apparet, quod in stipulatione, quæ ex hac causa interponitur, etiam heredis mentio fit."

(*e*) fr. 5. § 19. D. ibid.—fr. un. D. 43. 25.—*Dirksen,* l. c.

* At the present day, the *novi operis nunciatio* has only the effect of a protestation. If the *nunciatus* does not comply with it, recourse must be had to the court. The judge then examines into the matter on the spot, and decrees provisorily as to whether and how far the building up or tearing down is to be abstained from, until a final decision can be made.

the community in the way of feudal tenure. The old Roman law furnishes clear proofs, that the Romans originally regarded the property held by a paterfamilias as a loan from his household gods; and in accordance with this religious view, they derived the right of succeeding to the property from the succession to the duty of paying worship to these gods. This view, however, entirely disappears in the later Roman law. As barter, which manifestly formed the foundation of their system of contracts, resolved itself with the progress of civilization into contracts of many different kinds; so too occupancy, which constituted the original ground of the right of property, diverged into a variety of titles derived therefrom. This explains the unity of principle manifested in their doctrine of property, the noble simplicity of which was kept unimpaired in consequence of their entertaining essentially the same legal views with respect both to moveable and immoveable things. The doctrine of property developed in this liberal spirit shows the high degree of cultivation to which the Romans had attained; for we see, 1. that only very few classes of things were withdrawn from private ownership; 2. that, in their high esteem for the freedom of private property, they were averse to all restrictions of the same, especially to separating the rights inherent in ownership, as also to restraining of the liberty of free disposal, whether *inter vivos* or *mortis causa*.

The German law, on the contrary, made a strict separation between property in moveable and that in immoveable things; and hence arises an essential difference in the principles relating to the transfer or inheritance of moveable and immoveable property. This distinction had an intimate connexion with the public law. The possessor of landed property had as such the right of voting in corporation and state affairs, and the duty of supporting the public burthens; and as such he enjoyed the protection of the community. Besides the public prerogatives which the free German enjoyed in virtue of his immoveable property, in a manner similar to the *dominium quiritale* or *quiritarium* of the free Romans, there were also important family rights connected therewith; on which account the possession of landed property came to be regarded as the true lasting property of a free German.* K.

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* Originally the Romans had only one kind of property, viz. *dominium*. No other relation was recognised by the community, and consequently no other was protected. By degrees, however, specific remedies were introduced by the prætor for the protection of the possessor *ad usucapionem*, and among them a real action analogous to the action for property. Thus arose a two-fold kind of property, viz. DOMINIUM QUIRITALE (*ex jure Quiritium*) and BONITARIUM (*ex jure gentium; esse in bonis*): the former may be called a *dominium legale*, or *dominium* simply; and the latter a

TITLE FIRST.

DEFINITION AND NATURE OF PROPERTY.[a]

I. Meaning of the term *Property*.

§ 259. *Property* in its wider acceptation signifies *all that is our own*, all that forms a part of our estate, whether corporeal or incorporeal;[b]

(*a*) SOURCES: With respect to the *older* law, *Gaius*, II. § 1–97. and *Ulpian*, tit. 19.—With respect to the *later* law, Inst. 2. 1. Dig. 41. 1. Cod. 7. 25. LITERATURE: *On the older law*, *Hugo*, Rechts-Geschichte, p. 191–231. 509–537. 922–925.—Heidelberger Jahrbücher for 1809. p. 328.—*Gans*, Scholien zu Gaius. 5th Scholion.—*Dernburg*, Beiträge zur Gesch. der Röm. Testamente. p. 155–159. 316.—*Ballhorn*, Ueber Dominium. Lemgo, 1822.—*Manhayn*, Ueber den Ursprung und die Bedeutung der res mancipi et nec mancipi. Frankfort, 1823.—*Unterholzner* in the Rhein. Mus. Vol. 1. p. 129.—*Zimmern*, ibid. Vol. 3. p. 311.—*Pütter*, Die Lehre vom Eigenthume. Berlin, 1831. p. 76–126.—*Mayer* in the Z. f. gesch. R. W. Vol. 8. p. 1.—*Unterholzner* in the Rhein. Mus. Vol. 5. p. 1. *On the later law: Donelli* Comm. jur. civ. Lib. 9. c. 8–12. — *Westphal*, System des Römischen Rechts über die Arten der Sachen, Besitz, Eigenthum und Verjährung. Frankfort and Leipsic, 1791. — *Reinhard*, Einleitung in die Lehre vom Eigenthumsrechte. Frankfort and Leipsic, 1800.—*Gesterding*, Ausführliche Darstellung der Lehre vom Eigenthum. Greifswald, 1817.—*Pütter*, l. c. p. 149 seqq.

(*b*) fr. 49. D. 50. 16. (Ulpianus) "Bonorum appelatio aut naturalis, aut civilis est.

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dom. naturale, or simply *possessio ad usucapionem*. All kinds of moveable things were susceptible of quirital ownership; but this was not the case with immoveable things, with the exception of *prædia in Italico solo*,—prædia provincialia could be held only *in bonis*. None but Roman citizens could have a quirital ownership; and it could be procured only through a civil-law title. The principal effect of this quirital right of ownership, was the *rei vindicatio* as an action against every third party. The principal object which the prætor had in view in the introduction of bonitary ownership, was to protect the *possessor ad usucapionem* even before the completion of the *usucapio*. The distinction between quirital and bonitary ownership gradually lost its importance through the introduction of the distinction between *res mancipi* and *nec mancipi*; through the conferring of a real action for bonitary ownership, which in the earlier times of the republic most probably depended on the prætor's grant, but which after the prætor Publicius (*actio Publiciana*), in Cicero's time, was made fixed; and lastly through the abolishing of the *ordo judiciorum privatorum*, with which the formal distinction between the *vindicatio* and *Publiciana actio* disappeared. As *res mancipi*—to which, besides the *prædia in solo Italico* and *servitutes prædiorum rusticorum*, belonged those kinds of beasts which are easily recognised and which already in ancient times were held in particular esteem, whether for agricultural or other purposes (as oxen, horses, mules, and asses)—they regarded all those things for the acquisition of a property in which a civil-law title was required; while those which did not need it, were considered as *res nec mancipi*. Under Justinian, *dominium* and *bonæ fidei possessio* were equal in their effects; except that the bonitary owner had of course a weaker right than the actual owner, and on coming in contact with him was forced to yield. (*Marezoll*, Institutionen. 2d Ed. Leipsic, 1841. p. 150–158.—*Hugo*, Geschichte des Röm. Rechts bis auf Justinian. 11th Ed. Berlin, 1832. pp. 191 seqq. 517 seqq. 523 seqq. 922 seqq. 1120 seq.)

We must here notice another common distinction in ownership, viz. that between *dominium directum* and *utile*. Actions founded on strict law were called by the Romans *actiones directæ*; those granted on grounds of equity (*propter utilitatem*) were termed *actiones utiles*. Hence the glossators termed a right founded on strict law, *jus directum*; and an equitable right, *jus utile*. This they applied to property, speaking of *dominium directum* and *utile*; and they were right, so far as they intended thereby to distinguish between *strict* and *prætorian* ownership. But in the case of emphytensis, they spoke erroneously in another sense of a *dominium directum* and

while in its narrower sense it denotes merely the ownership of a corporeal thing (*dominium*).[a] Property therefore consists, according to its meaning and essence, in the ownership of a corporeal thing, or in other words, in that right by virtue of which the thing belongs to us, is our own.[b] Property in its nature is an unrestricted and exclusive right. Hence it comprises in itself the right to dispose of the substance of the thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it.[c]

II. Free and Burdened Property.

§ 260. Property in its nature is an *unlimited* and *exclusive* right. It may, however, be restricted in either of these respects, without the owner's ceasing to be owner.[d] In those cases where all the rights inherent in property vest in the owner himself, and his free exercise of the same is not obstructed by any right of another in the same thing, it is a *full* and *free* property, *proprietas plena* (s. c. *dominium plenum*). On the contrary, in those cases where the whole right of *using* the thing is separated from the ownership and pertains to another as a real right, the remaining right of the owner is termed a *nuda proprietas* (s. c. *domi-*

Naturaliter bona ex eo dicuntur, quod beant, hoc est, beatos faciunt; beare est prodesse. In bonis autem nostris computari sciendum est, non solum quæ dominii nostri sunt, sed et si bona fide a nobis possideantur, vel superficiaria sint. *Æque bonis annumerabitur, etiam si quid est in actionibus, petitionibus, persecutionibus*; nam hæc omnia in bonis esse videntur." It is in this wider sense that the Roman law sometimes speaks also of a '*dominium*' ususfructus and hereditatis; and of a '*vindicatio*' servitutis, pignoris, and successionis. fr. 3. D. 7. 6.—fr. 8. pr. D. 42. 5. (Idem) "In venditione bonorum etiam ususfructus venit, *quia appellatione domini fructuarius quoque continetur.*"—§ 7. J. 2. 19.—fr. 48. pr. D. 28. 5.—fr. 9. D. 39. 1.—fr. 16. § 3. D. 20. 1.—const. 4. C. 6. 9. "Emancipata, si non agnovit intra annum Unde liberi bonorum possessionem: nullam ad heredes *vindicationem successioni* transmittere potuit." Comp. fr. 25. pr. D. 44. 7.—Concerning this extension of the term *dominium*, see: *Du Roi* in the Archiv Civ. Prax. Vol. 6. p. 252 seqq. p. 386 seqq. and *G. F. Puchta* in the Rhein. Mus. Vol. 1. p. 286.—In regard to inquiries of this kind, even those expressions are of interest where the word is used in an improper sense, as in "dominus litis" (fr. 31. pr. D. 3. 3.), "dominus negotiorum" (§ 1. J. 3. 27.)

(*a*) Hence "corporis dominus," in contradistinction to him who enjoys a *jus in re* merely. fr. 13. § 1. D. 39. 2.—See *Glück*, Comm. Vol. 8. p. 576.

(*b*) fr. 13. pr. D. 41. 1.—fr. 1. § 1. D. 29. 5. (Ulpianus) "Domini appellatione continetur, qui habet proprietatem, etsi ususfructus alienus sit."

(*c*) *Hasse*, Beiträge zur Lehre von der ehelichen Gütergemeinschaft. § 12–14.

(*d*) fr. 25. pr. D. 50. 16. (Paulus) "Recte

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utile, without reflecting that the emphyteuta has no ownership at all; and this they transferred also to the feudal relation. (Comp. *Thibaut* in Braun's Erörterungen. § 557.—*Mittermaier*, Grundsätze des deutschen Privatrechts. 6th Edit. § 156). In the middle ages a theory arose with regard to property in land, in consequence of the political rights therewith connected, by which it was resolved into two independent rights of ownership—a *dominium directum* on the part of the lord, and a *dominium utile* on the part of the vassal. This divided ownership can by no means be deduced from the Roman law: it is founded in the feudal law, which grants to the *dominus directus* the jus proprietatis and the eventual right to escheats together with vindication, and to the *dominus utilis* a full right of use as well as a right to dispose of the substance. (*Pœts*, Lehnrecht. Gottingen, 1819. § 24. *Mittermaier*, l. c.)

nium minus plenum).[a] Property may also be restricted by various other *jura in re* belonging to others than the owner; and in cases of this kind it is a *burdened* property.

III. Revocable Property.

§ 261. Property in its nature is also an *irrevocable* right, i. e. he who has once acquired it cannot be deprived of it against his will; unless for a special reason the former proprietor or a third party holds the right in a certain case either to demand it back again or to claim it for himself. It is then termed *revocable* property; and, 1. Either it is revocable from the beginning, when the ground of its revocability lies in the *mode* in which it was acquired (called *dom. revocabile ex tunc*). Here the revocation is either founded directly on provisions of the laws themselves, as e. g. in the case of a *dos* or *fideicommissum;* or it ensues from an actual reservation of the right of property made, for certain contingencies, on transferring the thing to another.[b] In cases of this kind, the termination of the right of property has a retroactive effect back to the time of acquisition. He who resumes the right of property in the thing, or the third party to whom it now falls, can enforce it by an *actio in rem* against any one who is in possession of it;[c] and with respect to real rights granted to others by the former proprietor during his ownership, the rule applies: *Resoluto jure conceden-*

dicimus *eum fundum totum nostrum esse, etiam cujus ususfructus alienus est*, quia usus-fructus non dominii pars, sed servitutis sit, ut via et iter: nec falso dicitur, totum meum esse, cujus non potest ulla pars dici alterius esse; hoc et Julianus, et est verius."

(*a*) fr. 4. D. 23. 3. (Idem) "*Si proprietati nudæ* in dotem datæ ususfructus accesserit, incrementum videtur dotis, non alia dos, quemadmodum si quid alluvione accessisset." —fr. 126. § 1. D. 45. 1.—fr. 2. pr. D. 7. 4.—fr. 17. D. ibid. (Julianus) "Si tibi *ususfructus* pure, *proprietas* autem sub conditione Titio legata fuerit, et pendente conditione dominium proprietatis acquisieris, deinde conditio exstiterit, *pleno jure* fundum Titius habebit. Neque interest, quod *detracto usufructu proprietas* legata sit; dum enim proprietatem acquiris, jus omne legati ususfructus amisisti."—§ 4. J. 2. 4. "Quum autem finitus fuerit *ususfructus*, revertitur scilicet ad proprietatem, et ex eo tempore *nudæ* PROPRIETATIS DOMINUS incipit *plenam* in re habere potestatem."—The one who enjoys the mere right of proprietorship is called *dominus proprietatis* in contradistinction to the *usufructuarius*. fr. 15. § 6. D. 7. 1. (Ulpianus) "PROPRIETATIS DOMINUS non debebit impedire fructuarium ita utentem, ne deteriorem ejus conditionem faciat. De quibusdam plane dubitatur, si eum uti prohibeat, an jure id faciat? Utputa doliis, si forte fundi usus-fructus sit legatus. Et putant quidam, et si defossa sint, uti prohibendum. Idem et in seriis, et in cupis, et in cadis et *amphoris* putant. Idem et in specularibus, si domus usus-fructus legetur. Sed ego puto, *nisi sit* contraria voluntas, etiam instrumentum fundi vel domus contineri." See also fr. 72. ibid.—fr. 9. § 4. D. 7. 9. (Idem) "Si plures *domini* sint *proprietatis*, unusquisque pro sua parte stipulabitur." fr. 9. pr. D. ibid.—fr. 66. D. 23. 3.—fr. 57. D. 24. 3.—fr. 33. D. 6. 1.—See *Löhr* in his Mag. Vol. 3. p. 483. Vol. 4. p. 135.

(*b*) As to the reservation of the right of property *by agreement*, the transfer of a mere precaria possessio, as a general rule, is to be presumed, provided the *resolutio* which has been agreed upon for a certain case, be plainly expressed. E. g. one who accepts part of the price, must expressly declare that he means to have the right of property reserved to himself on account of the *reliquum pretium*. const. 3. C. 4. 54.—Comp. *Schmidt*, Commodatum und Precarium. Leipsic, 1841.

(*c*) fr. 41. pr. D. 6. 1. (Ulpianus) "Si quis hac lege emerit, ut, si alius meliorem conditionem attulerit, recedatur ab emtione, post allatam conditionem jam non potest in rem actione uti. Sed et si cui in diem addictus sit fundus, antequam addictio sit facta, *uti in rem actione potest; postea non poterit.*"—fr.

tis, resolvitur jus concessum.[a] 2. Or it was irrevocable at the beginning, and its revocability is founded on an event that has subsequently taken place (called *dom. revocabile ex nunc*).[b] In this case the effects of the right of property cease from the moment of its recall, and the above rule is not applicable; for here the revoker never has more than a personal action against the former owner, and consequently he cannot sue the third possessor of the thing.[c] And it would therefore be more proper to use the term "revocable property" only in cases of the first description.[d] *

4. § 3. D. 18. 2. (Idem) "Sed et Marcellus libro quinto Digestorum scribit: pure venditio, et in diem addicto fundo, si melior conditio allata sit, *rem pignori esse desinere, si emtor eum fundum pignori dedisset.* Ex quo colligitur, quod emtor medio tempore dominus est, alioquin nec pignus teneret."—fr. 2. § 4. D. 41. 4. (Paulus) "Si in diem addictio facta sit (id est, nisi si quis meliorem conditionem attulerit), perfectam esse emtionem, et fructus emtoris effici, et usucapionem procedere, Julianus putabat. Alii et hanc sub conditione esse contractam; ille, non contrahi, sed resolvi dicebat: quæ sententia vera est. § 5. Sed et illa emtio pura est, ubi convenit, ut, si displicuerit intra diem certum, inemta sit."—const. 1. C. 4. 54. "Si ea lege prædium vendidisti, ut, nisi intra certum tempus pretium fuisset exsolutum, emtrix arrhas perderet, *et dominium ad te pertineret: fides contractus servanda est.*"—const. 4. ibid. "Commissoriæ venditionis legem exercere non potest, qui post præstitutum pretii solvendi diem *non vindicationem rei eligere, sed usurarum pretii petitionem sequi maluit.*"—*Thibaut*, Civ. Abh. p. 366.—*Glück*, Comm. Vol. 16. p. 247. 263. 284.—*Seuffert*, Erört. p. 92.—*Zimmern* in the Archiv Civ. Prax. Vol. 5. p. 234.—*Fritz*, ibid. Vol. 8. p. 286. Another opinion has been advanced by *Riesser* in the Z. f. Civ. R. und Proc. Vol. 2. p. 1 seqq. and *Lauck*, ibid. Vol. 8. No. 1. But see contra: *Thibaut* in the Archiv Civ. Prax. Vol. 16. p. 383. and *Müller*, Civ. Abh. Vol. 1. No. 7.—Comp. also *Savigny*, System des Röm. Rechts. Vol. 3. p. 155. and more especially *Sell*, Bedingte Traditionen. Zurich, 1839.

(*a*) Instances are contained in the following passages: fr. 3. D. 20. 6. (Ulpianus) "Si res distracta fuerit sic: *nisi intra certum diem meliorem conditionem invenisset*, fueritque tradita, et forte emtor ante, quam melior conditio offerretur, hanc rem pignori dedisset, Marcellus libro quinto Digestorum ait: *finiri pignus*, si melior conditio fuerit allata; quanquam ubi sic res distracta est: *nisi emtori displicuisset*, pignus finiri non putet."—fr. 31. D. 20. 1. (Scævola) "Lex vectigali fundo dicta erat, ut, si post certum temporis vectigal solutum non esset, is fundus ad dominum rediret; postea is fundus a possessore pignori datus est. Quæsitum est: an recte pignori datus esset? Respondi: si pecunia intercessit, pignus esse. Item quæsitum est: si, quum in exsolutione vectigalis tam debitor quam creditor cessassent, et propterea pronuntiatum esset, fundum secundum legem domini esse, cujus potior causa esset? Respondi: si, ut proponeretur, vectigali non soluto jure suo dominus usus esset, *etiam pignoris jus evanuisse.*"—fr. 105. D. 35. 1. (Pomponius) "Si fundum a testatore sub conditione legatum heres alii pendente conditione legavit, postea existente conditione, quæ priore testamento proposita fuerat, neque proprietas a priore legatario recedet, nec locum religiosum in eo fundo heres facere, nec servitutem imponere poterit; sed et imposita servitus finietur existente conditione."—fr. 11. § 1. D. 8. 6. (Marcellus) "Heres, quum legatus esset fundus sub conditione, imposuit ei servitutes; *an exstinguantur, si legati conditio existat?* videamus, an acquisitæ sequantur legatarium? Et magis dicendum est, ut sequantur."—fr. 4. § 3. D. 18. 2.

(*b*) For instance: const. 8. 10. C. 8. 56.

(*c*) The personal action is directed to damages, in case the thing is not returned *in natura.*

(*d*) *Müller*, l. c. p. 254.—*Thibaut*, System. 7th Ed. § 579.

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* The Editor will here briefly specify somewhat more precisely the nature and consequences of revocation.

1. The DOMINIUM REVOCABILE EX NUNC is originally acquired irrevocably; and hence the former proprietor's right to recall arises subsequently, e. g. when there occurs a legal ground to revoke the *inter vivos donatio* which he has made, as for instance gross ingratitude. Here the former proprietor has no action against the third possessor, but only a personal action against the donee for the surrender of the thing or of the *id quod interest*; and he must respect all the real rights granted in the meantime by the donee to third persons.

2. The DOMINIUM REVOCABILE EX TUNC, on the contrary, is revocable from the very

IV. Joint Property.

§ 262. The essence of the right of property consists in the proprietorship of the thing (§ 259). It is however in its nature a wholly exclusive right; i. e. that which actually belongs to one cannot for that very reason belong to another. Thus the right of property in one and the same thing can never belong to more than one; and it cannot be conceived that each one of several parties could be the proprietor of the *whole* thing.[a] Still a thing may form the common property of several in such a manner that each has an ideal share therein.[b] Here none of them is the owner of the whole thing; each is proprietor of his ideal portion only, but this he owns exclusively. Modern jurists call this, *joint property* or *condominium*.[c]

TITLE SECOND.

ACQUISITION OF PROPERTY.[d]

I. General Requisites of Acquisition.

§ 263. The acquisition of property requires: 1. A *person* who is capable of acquiring. In general every one is incapable of acquiring who cannot will (e. g. madmen and lunatics), except where the acqui-

(*a*) fr. 5. § 15. D. 13. 6. (Ulpianus) "Duorum in solidum dominium vel possessio esse non potest." fr. 3. § 5. D. 41. 2.—See above, § 236.—*Hasse*, Eheliche Gütergemeinschaft. § 11.—*Gesterding*, Eigenthum. § 9.

(*b*) In the Roman law the phrases "plures rem pro indiviso possident," or "res quam quis cum alio communem habet." are used to distinguish things owned jointly, from: "res, quam quis solus habet."—fr. 4. § 7. D. 10. 1. (Paulus) "*Si communem fundum ego et tu habemus*, et vicinum fundum ego solus, an finium regundorum judicium accipere possumus? Et scribit Pomponius: non posse nos accipere, quia ego et socius meus in hac actione adversarii esse non possumus, sed unius loco habemur. Idem Pomponius: ne utile quidem judicium dandum, dicit, quum possit, qui proprium habet, vel communem vel proprium fundum alienare, et, sic experiri."-fr. 8. D. 6. 1.—fr. 5. D. 45. 3.—fr. 25. § 1. D. 50. 16.—*Thibaut*, System des Pand. R. 7th Ed. § 215.

(*c*) *Weichsel*, Ueber gemeinschaftliches Eigenthum, Gemeinheiten und Servituten. Magdeburg, 1824.

(*d*) Inst. 2. 1.—D. 41. 1.—*Donelli* Comm. jur. civ. Lib. 4. c. 7. Lib. 5. c. 1-31.—*He-*

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grant of it, and accordingly is so from the beginning. We must distinguish, however, between two cases, viz. that in which the ownership is to terminate *ipso jure*, and that in which the restoration of the same is to be only a *personal obligation*. If the *ex tunc* revocable ownership is to terminate *ipso jure*, as e. g. where the *lex commissoria*, the *retrovenditio*, or the *addictio in diem* is agreed upon in such wise that on the occurrenc of some ceertain event the sale shall be regarded as not having been made, the former proprietor may demand the thing back by means of a real action even from a third possessor, and all real rights in the thing that have been granted in the me antime (as servitudes, mortgages, &c.) terminate at once, according to the rule, "*Resoluto jure concedentis, resolvitur jus concessum.*" But if the *ex tunc* revocable ownership is not to terminate *ipso jure*, and the sale consequently is not intended to be regarded as not made, the present proprietor being only personally obliged to restore the thing to the vendor,—then the former owner, as in the case of the *dominium revocabile ex nunc*, neither has an action against a third possessor, nor can he evade the real rights in the thing that have been granted in the meantime; so that he has only a personal action for the restoration of the thing or of the *id quod interest*.

sition does not depend on the will of the acquirer;[a] and to these must be added every one whom the law declares to be absolutely incapable of acquiring property, or at least of acquiring certain kinds. Those who can acquire rights for others, although not for themselves, are also capable of acquiring property for others.[b] 2. A *thing* in which property can be acquired, and that too by him who wishes to acquire it.[c] 3. A legal *mode of acquisition* or *title* (*acquisitio, species s. genus acquisitionis, causa acquirendi;* now called *modus acquirendi*).[d]* The Roman

nel, Diss. de acquirendo rerum dominio. Leipsic, 1817.—*De Bosch*, Histor. expositio de dominio ejusque acquirendi modis. Groningen, 1832.—*Gesterding*, l. c. § 11.

(*a*) For instance, § 3. J. 3. 1.—fr. 63. D. 29. 2.

(*b*) Inst. 2. 9. See above, § 183. note *c*.

(*c*) § 7. J. 2. 1.—fr. 6. § 2. D. 1. 8.—§ 4. J. 2. 20.—const. 1. C. ne Christianum mancipium hæreticus habeat (1. 10). (*Impp. Honorius et Theodosius AA. Monaxio Pf. P.*) Judæus servum Christianum nec comparare debebit, nec largitatis vel alio quocunque titulo consequetur. Quodsi aliquis Judæorum mancipium vel Christianum habuerit, vel sectæ alterius seu nationis crediderit ex quacunque causa possidendum, et id circumciderit, non solum mancipii damno mulctetur, verum etiam capitali sententia puniatur, ipso servo pro præmio libertate donando." *Dat. IV. Id. April. Constantinop. Honorio A. XI. et Constantino VC. II. Conss.* (A. D. 417.)—const. 2. ibid. (*lex restituta*).—Græcus ‖Paganus‖, et Judæus, et Samaritanus, et quicunque non est orthodoxus, non potest Christianum mancipium habere, neque catechumenum circumcidere; quia et ipsum mancipium Christianum ad libertatem pervenit, et qui possidet, dat privatis largitionibus triginta libras."—fr. 49. § 2. D. 31. (Paulus) "Labeo refert: *agrum, cujus commercium non habes, legari tibi posse*, Trebatium respondisse; *quod merito Priscus Fulcinius falsum esse aiebat.*"

(*d*) The theory, formerly so common, that to *every* acquisition of property a titulus and

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* It is only with respect to the acquisition of property *per traditionem* and *per usucapionem* that the Roman law speaks of a *justa causa præcedens*, i. e. of a legal ground or title which gives rise to *traditio* or *usucapio*. But this *justa causa* is nothing more than a prerequisite for *usucapio*, and so too for all those modes of acquisition where tradition may come in question. For as regards *usucapio*, it is a ground of acquisition only in case it has the requisite *justa causa;* consequently the *justa causa* is not here in itself a ground of acquisition, but the *usucapio* forms the title whereby property is to be acquired. Again, as to tradition, it may be necessary not only to the acquisition of property, but also to the acquisition of a real right, and even to the fulfilment of a personal obligation; and it may be performed with very different intents. The fact of tradition however does not of itself establish a right: it is only the ground and intent of which it is the result that can decide; for one may make tradition in order to transfer *titulo oneroso* or *gratuito* either property or any real right, to grant a transitory use of the thing, to make a deposite merely, &c. &c. When therefore the tradition presupposes a *justa causa*, in order to effect a transfer of property, this means neither more nor less than that tradition of itself is of no effect, that on the contrary a legal title must exist, and that in different kinds of acquisition it forms one of the requisites to the same. It was a manifest error of the older jurists, to construct from this the theory that the acquisition of property presupposes a *titulus acquirendi* (ground of acquisition *in abstracto*) and a *modus acquirendi* (ground of acquisition *in concreto*), as two things distinct from each other. It may be observed, moreover, that the term *titulus*, although the classical jurists used it only with reference to acquisition by prescription, was employed under the later emperors in its modern acceptation to denote also every other ground of acquisition.

The principal division of the modes of acquiring property is that into *acquisitiones originariæ* and *derivativæ*, according as one acquires property originally or succeeds to the right of a predecessor. In the Roman law we find a distinction made between *acquisitiones rerum singularum* and *acquisitiones per universitatem* (comp. § 182), and also between *acquisitiones legitimæ* and *naturales*. The *acquisitiones legitimæ* (or, as they are termed in the text, *acquis. juris civilis*) are, according to Ulpian, l. c. (see p. 274, note *a*.) MANCIPATIO, IN JURE CESSIO, USUCAPIO, ADJUDICATIO, and LEX (*lege acquirere* means *acquirere* IPSO JURE). Hereto consequently belongs, e. g. the *legatum;* and to this might be added the *hereditas* (although, as a *successio universalis*, it forms a

law distinguishes[a] between *acquisitio per universitatem* and *acquisitio rerum singularum*: it denotes by the former, the case where things are acquired by the acquisition of the whole estate to which they belong; and by the latter, the case where single things are acquired as such. The *acquisitio per universitatem*, however, does not relate exclusively to the acquisition of property, but equally applies to the acquisition of other rights.[b] Among acquisitions of this description, the most important is that of inheritance, of which we shall hereafter treat under the Law of Inheritance. With respect to the *acquisitiones singularum rerum*, those only which already admit of a full exposition will be considered in this place; the rest will be more appropriately reserved for other heads.[c]*

a modus acquirendi distinct therefrom were required, and which is still found in *Höpfner's* Comm. § 393. and in many other writings both ancient and modern, is erroneous. See concerning it: *Hugo*, Civ. Mag. Vol. 1. p. 83. Vol. 4. p. 137.—*Thibaut*, Versuche. Vol. 1. No. 11.—*Schöman*, Handb. des Civ. R. Vol. 2. No. 7.—*Seuffert*, Erörterungen. II. p. 15.—*Glück*, Comm. Vol. 8. § 578.

(*a*) The Roman distinction between acquisitiones juris gentium and acquisitiones juris civilis is obsolete. § 6. J. 2. 9.—fr. 1. pr. D. 41. 1. (Gaius) "Quarundam rerum dominium nanciscimur jure gentium, quod ratione naturali inter omnes homines perœque servatur, quarundam jure civili, id est jure proprio civitatis nostræ. Et quia antiquius jus gentium cum ipso genere humano proditum est, opus est, ut de hoc prius referendum sit."—*Ulpian*, 19.—*Gaius*, II. 18 seq.

(*b*) To this head belong, according to the older law, especially the acquisitio per arrogationem, per conventionem uxoris in manum mariti, per emtionem bonorum *debitoris* oberati, per hereditatem et bonorum possessionem, and some others. See in general, *Gaius*, II. 98. III. 77 seq.—Inst. III. 10–12 (11–13). In the later law the acquisition by inheritance is the only one that is retained, § 6. J. 2. 9.; this will be treated of in the Fourth Book.

(*c*) Thus we shall consider under Rights of Inheritance the acquisition of property by *legacies*, and under Family Rights the acquisition of property by *dower*, as well as some of those cases in which property is acquired directly *by provision of law* (*ipso jure*; *lege*), e. g. in case of a second marriage or a divorce on account of adultery (*pœnæ secundarum nuptiarum*; *lucra ex divortio*).

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ground of acquiring rights in general, and accordingly is not to be applied exclusively to the acquisition of the right of property). The *acquisitiones naturales* may be reduced to two classes; viz. 1. Those in which an act founds the acquisition. This is the case in *occupatio*, *traditio*, and *specificatio*. 2. Those in which the attractive power of one thing produces the ownership of the other also (*Accessorium sequitur suum principale*). This is the case with accessions, viz. *a*. the self-generated increase (fruits); and, *b*. the external additions, which comprise *adjunctio*, where moveables are added to moveables; *plantatio*, *satio*, *tigni junctio*, where by planting, sowing, and building, moveables are added to immoveables; *alluvio*, *alvei derelictio*, and *insulæ in flumine publico formatio*, where immoveable is added to immoveable. A mixed kind of accession, founded sometimes on an act (occupancy, tradition, specification), and sometimes on a unilateral or mutual accession, consists in the mixture of things dry or liquid; and this produces either sole or joint ownership (§ 270).

* Our Author treats of the different modes of acquiring property separately, without applying to them any fundamental division. Several teachers of law have chosen another course; reducing them to two classes, the *first* of which includes those modes in which the acquisition presupposes other property on the part of the acquirer, and the *second* those in which no other property is presupposed. Thus they reckon as belonging to the first class the following modes: *a*. ACCESSIO (which embraces *fructus*, *alluvio*, *insula in flumine nata*, *alveus derelictus*, *inædificatio*, *implantatio*, *intextura*, *adferruminatio*, &c.); *b*. COMMIXTIO and CONFUSIO; and *c*. ADJUDICATIO: and as belonging to the second class, *a*. OCCUPATIO (including *hunting*, *fishing*, *fowling*, &c.); *b*. SPECIFICATIO; *c*. TRADITIO; *d*. PRÆSCRIPTIO, &c.

A different classification has been made by others, who distinguish between, 1. those

II. Modes of Acquisition.

A. Occupatio.

§ 264. *Occupancy* is that mode of acquiring property which is founded on the principle, *Res nullius cedit occupanti*, i. e. he who takes possession of a thing without an owner, with the design of appropriating it to himself, becomes thereby proprietor of the same.[a] According to the Roman law, there are three kinds of occupancy, viz: 1. The *occupancy of living ownerless things;* to which belong, according to the Roman law, all wild animals that live upon the earth, in the waters, or in the air, provided that they are still in their natural state of freedom and have not yet been caught; or, if they have had an owner, that they have again returned to their natural freedom. This kind of occupancy therefore comprises hunting, fishing, and fowling.[b] 2. The *occupancy of inanimate ownerless things*, or *finding*;[c] yet of a *treasure* which is found by accident one half is considered to belong as an accession

(*a*) fr. 3. D. 41. 1. (Paulus) "Quod (enim) *nullius est*, id ratione naturali occupanti conceditur."—*Gaius*, II. 66. "Nec tamen ea tantum, quæ traditione nostra fiunt, naturali nobis ratione acquiruntur, sed etiam quæ occupando ideo acquisierimus, quia antea nullius essent; qualia sunt omnia quæ terra, mari, cœlo capiuntur. § 67. Itaque si feram bestiam, aut volucrem, aut piscem ceperimus, quidquid ita captum fuerit, id statim nostrum fit, et eousque nostrum esse intelligitur, donec nostra custodia coërceatur; cum vero custodiam nostram evaserit et in naturalem libertatem se receperit, rursus occupantis fit, quia nostrum esse desinit. Naturalem autem libertatem recipere videtur, cum aut oculos nostros evaserit, aut licet in conspectu sit nostro, difficilis tamen ejus persecutio sit. § 68. In iis autem animalibus, quæ ex consuetudine abire et redire solent, veluti columbis et apibus, item cervis qui in silvas ire et redire solent, talem habemus regulam traditam, ut, si revertendi animum habere desierint, etiam nostra esse desinant, et fiant occupantium. Revertendi autem animum videntur desinere habere, cum revertendi consuetudinem deseruerint. § 69. Ea quoque, quæ ex hostibus capiuntur, naturali ratione nostra fiunt."—§ 12–18. J. 2. 1.—*Huber*, Prælectiones secundum Institt. et Dig. 3 Vols. 3d Edit. Leipsic, 1735. p. 95.—*Gesterding*, Eigenthum. § 13–19.—*Brouwer* de jure occupandi. Leyden, 1822.—*Heisselink* de dominio ejusque acquirendi modis per occupationem et accessionem. Groningen, 1821.—*Osenbrüggen* de jure belli et pacis Romanorum. Leipsic, 1836.

(*b*) § 12. J. 2. 1. "Nec interest, feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno."—fr. 5. § 1. D. 41. 1. (Gaius) "Illud quæsitum est: an fera bestia, quæ ita vulnerata sit, ut capi possit, statim nostra esse intelligatur. Trebatio placuit, statim nostram esse, et eousque nostram videri, donec eam persequamur; quodsi desierimus eam persequi, desinere nostram esse, et rursus fieri occupantis; itaque si per hoc tempus, quo eam persequimur, alius eam ceperit eo animo, ut ipse lucrifaceret, furtum videri nobis eum commisisse. Plerique non aliter putaverunt eam nostram esse, quam si eam ceperimus, quia multa accidere possunt, ut eam non capiamus; quod verius est." fr. 1. § 1. fr. 2–6. D. 41. 1.

(*c*) § 18. J. ibid. "Item lapilli, et gemmæ, et cetera, quæ in litore inveniuntur, jure naturali statim inventoris fiunt."—fr. 1. § 1. D. 41. 2.

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modes in which the acquisition is made IPSO JURE, i. e. by the operation of the law itself without any act of the party acquiring; and, 2. those in which the acquisition is effected by the act of the party who acquires. Accordingly they rank under the first class the acquisition by *accessio*, *legacy*, &c.; while the second class comprises all acquisitions by unilateral acts (*occupatio*, *specificatio*), as well as the *traditio* of the former owner and its subordinate kinds, among which they reckon even the *usucapio*, considering that mode of acquisition as introduced for the purpose of completing the *traditio* of a *non-dominus*. Comp. the Editor's preceding note.

to the soil in which it is found.[a] Things however which have been lost, or thrown overboard from a ship through necessity, are not to be considered as ownerless.[b] 3. The *capture of goods in war;* for the Roman law also regards things belonging to the enemy as ownerless, and accordingly permits the occupancy of them.[c] Yet here a return to former ownership (*postliminium*) often takes place,[d] to wit, in the case of recaptured immoveable things and slaves.[e] According to the German law, all these three kinds of occupancy are much more restricted, and rest in a great measure on entirely different principles from those followed by the Roman law. This is owing to the modern extension of the royal prerogative, which embraces nearly all those things which were regarded by the Romans as ownerless.[f*]

(*a*) § 39. J. 2. 1.—fr. 3. § 10. D. 49. 14. (Callistratus) "Si in locis fiscalibus vel publicis, religiosisve, aut in monumentis thesauri reperti fuerint, DIVI FRATRES constituerunt, ut *dimidia pars* ex his *fisco* vindicaretur; item si in Cæsaris possessione repertus fuerit, dimidiam æque partem fisco vindicari." These two passages seemed to contradict each other; but they have now been reconciled by means of *Gaius*, II. 7. The latest constitution on the finding of treasure is const. un. C. 10. 15. "Nemo in posterum super requirendo in suo vel alieno loco thesauro, vel super invento ab alio vel a se effusis precibus pietatis nostræ benignas aures audeat molestare. Nam in suis quidem locis uniculque, dummodo sine sceleratis ac puniendis sacrificiis aut alia qualibet arte legibus odiosa, thesaurum (id est condita ab ignotis dominis tempore vetustiore mobilia) quærere, et invento uti, liberam tribuimus facultatem: ne ulterius Dei beneficium invidiosa calumnia persequatur: ut superfluum sit hoc precibus postulare, quod jam lege permissum est, et postulanda imperatoriæ majestatis videatur prævenire liberalitas. In alienis vero terrulis nemo audeat invitis, immo nec volentibus vel ignorantibus dominis opes abditas suo nomine perscrutari. Quodsi nobis super hoc aliquis crediderit esse supplicandum, aut præter hujus legis tenorem in alieno loco thesaurum scrutatus invenerit, totum hoc locorum domino reddere compellatur, et velut temerator legis saluberrimæ puniatur. *Quodsi forte* vel arando, vel alias terram alienam colendo, vel quocunque casu, *non studio perscrutandi*, in alienis locis thesaurum invenerit, id quod repertum fuerit, dimidia retenta, altera dimidia data, cum locorum domino partiatur. Ita enim eveniet, ut unusquisque *suis* fruatur, et non inhiet alienis." (A. D. 474.)—*Ortloff*. Comm. jur. Rom. de thesauris. Erlangen, 1818.—*Sell*, Versuche. Vol. 1. Nos. 3. 4. See also below, § 267 in fine.

(*b*) § 48. J. 2. 1. "Alia sane causa est earum rerum, quæ in tempestate maris, levandæ navis causa ejiciuntur. Hæ enim dominorum permanent, quia palam est, eas non eo animo ejici quod eas habere non vult, sed quo magis cum ipsa navi maris periculum effugiat. Qua de causa, si quis eas fluctibus expulsas, vel etiam in ipso mari nactas lucrandi animo abstulerit, furtum committit; nec longe discedere videntur ab his, quæ de rheda currente non intelligentibus dominis cadunt."—Dig. 41. 7.

(*c*) § 17. J. 2. 1. "Item ea, quæ ex hostibus capimus, jure gentium statim nostra fiunt, adeo quidem, ut et liberi homines in servitutem nostram deducantur; qui tamen si evaserint nostram potestatem, *et ad suos* reversi fuerint, pristinum statum recipiunt."—fr. 5. § 7. D. 41. 1.—fr. 51. § 1. D. 41. 1. (Celsus) "Et quæ res hostiles apud nos sunt, non publicæ, sed occupantium fiunt."—*Gesterding*, l. c. § 18.

(*d*) Dig. 49. 15.—Cod. 8. 51.

(*e*) fr. 20. § 1. fr. 28. D. 49. 15.

(*f*) For the present law of Germany on this subject, see: *Seidensticker*, Comm. de fundamentis juris supremæ potestatis circa adespota. Gottingen, 1789.—*Gesterding*, l. c. § 15. 19.—*Pfeiffer*, Das Recht der Kriegeroberung in Beziehung auf Staatscapitalien. Cassel, 1823.—*Kritz*, Rechtsfälle. Vol. 1. No. 7.

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* Occupancy applies only to *res nullius*, i. e. things which have had no owner before (e. g. deserts, shells and other things cast up from the sea, &c.); *b*. things whose owner cannot be ascertained, as is usually the case with buried treasures; *c*. things which have been relinquished by their owner (*res derelictæ*). Things lost or thrown overboard on account of peril at sea cannot be considered as relinquished; because dereliction does not consist merely in abandonment of possession, a more essential requisite being the abandonment of the intention of owning them (*animus domini*). He therefore who conceals and retains lost things which he has found, commits a *furtum inventionis*; for

B. Specificatio.

§ 265. The so-called *specificatio* is that mode of acquisition through which a person, by transforming a thing belonging to another, especially by working up his material into a new species, becomes proprietor of the same.[a] If he who produces the new species has made it

(a) *Gesterding*, l. c. § 35.—*Koch* de jure ejus qui speciem ex aliena materia fecit. Marburg, 1829. The word *specificatio* was not used by the Romans, though they employed the phrase *speciem facere*.—Dr. Rosshirt very correctly rejects the opinion maintained by *G. F. Puchta* (Lehrbuch der Pandecten. Leipsic, 1838. § 131.), who represents specification as a kind of occupancy. Specification is certainly an *originary* mode of acquisition, a fact which may be of importance with respect to the proof of the right of ownership as far as the 'jus auctoris' is concerned; still the *nova species* is not a *res nullius*, as Puchta assumes, who follows here the views of the school of Proculus. This will be evident from the arguments contained in fr. 7. § 7. quoted below, which shows that specification is to be regarded from the same point of view as accession; for, the materials are not consumed but merely changed by the specificator."—

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things which have been lost belong still to their proprietor or his heir, as long as they can be discovered. In cases of doubt as to whether the things found belong to the category of things lost or to that of treasures, the nature of the spot where they were found and the condition of the place will aid in determining this question; inasmuch as the essence of a treasure consists in its having been hidden by the owner in order to keep it secret.

The taking of spoil, was permitted by the Romans only in their wars with other nations, and then only in regard to moveable things (" *Quæ res ex hostibus capiuntur, jure gentium statim capientium fiunt*"); in later times it seems to have been suffered only on the supposition that the soldiers had obtained the permission of the commander-in-chief. The *jus postliminii* (i. e. the restoration of rights of property or of personal condition which had been lost in war) took place after the enemy had been expelled, and applied principally to cases where citizens had been captured by the enemy and reduced to slavery, as also to immoveable property which the enemy had taken possession of, and a few kinds of moveable things, as horses, mules, and ships. (See *Festus*, sub voce: Postliminium. And *Hugo*, Geschichte des Röm. R. bis auf Justinian. 11th Ed. pp. 203. and 204.) According to the modern European law of nations, the *jus occupationis bellicæ* is more restricted. Since the nation itself and not its soldiers constitute the party to the war, it naturally follows that things taken in war belong to the state and not to the soldiers, unless they have received a special permission to that effect. Privateering, plundering, and foraging, are now permitted only as exceptions; and as to prizes, the competent authorities (in France, the *Conseil des prises*) have to determine, in cases of doubt, whether the prizes made are valid according to the laws on the subject. Arms, ammunition, provisions, the military chest taken from the enemy, become the property of the state; captives are either exchanged, ransomed, or returned without recompense; and occupied countries are provisorily kept possession of, until something definitive is determined on by the treaty of peace. This should also settle what is requisite in regard to indemnification for the expenses of carrying on the war, as well as respecting the losses and damage which the enemy has unjustly brought upon the citizens of the state.

In the view of the Romans, *animalia fera*, or wild beasts, were res nullius; hence the property in them ceased, as soon as they had made their escape. The property in *animalia mansuefacta*, or tamed animals, e. g. deer, pigeons, peacocks, bees, or a tamed bear, is lost as soon as they have returned to their natural, wild state, and have escaped from our sight (*cum oculos effugerint*). *Animalia mansueta*, i. e. animals whose nature renders them familiar with man, as e. g. domestic animals, fowls, &c., are objects of private property, and consequently are not acquired by occupancy. At the present day in Germany, the right of occupancy, as far as relates to hunting, fishing, and fowling, (all but the right to catch butterflies and cockchafers!) is monopolized by the state, the princes, the nobility, and here and there a private proprietor. The romantic period of occupancy has vanished for ever along with the kindred simplicities of the golden age.

partly out of his own and partly out of another's material, he always acquires the ownership of the thing; but if on the contrary he has formed the new species out of another's material alone, it depends on whether it is or is not possible to restore it to its former state.[a] In the former case, the proprietor of the thing becomes also proprietor of the new species; but then he must indemnify the specificator, provided the latter had acted *in bona fide*.[b] In the latter case, the specificator becomes proprietor of the new species, supposing that he had had the intention of fabricating it for himself;[c] for as regards the *acquisition of*

fr. 7. § 7. D. 41. 1. (Gaius) "Cum quis ex aliena materia speciem aliquam suo nomine fecerit, Nerva et Proculus putant, hunc dominum esse, qui fecerit, quia quod factum est, antea nullius fuerit. Sabinus et Cassius magis naturalem rationem efficere putant, ut, qui materiæ dominus fuerit, idem ejus quoque, quod ex eadem materia factum sit, dominus sit, quia sine materia nulla species effici possit, veluti si ex auro, vel argento, vel ære tuo vas aliquod fecero, vel ex tabulis tuis navem, aut armarium, aut subsellia fecero, vel ex lana tua vestimentum, vel ex vino et melle tuo mulsum, vel ex medicamentis tuis emplastrum aut collyrium, vel ex uvis, aut olivis, aut spicis tuis vinum, vel oleum, vel frumentum. Est tamen etiam media sententia recte existimantium, si species ad materiam reverti possit, verius esse, quod et Sabinus et Cassius senserunt; si non possit reverti, verius esse, quod Nervæ et Proculo placuit. Ut ecce vas conflatum ad rudem massam auri, vel argenti, vel æris reverti potest, vinum vero, vel oleum, vel frumentum ad uvas, et olivas, et spicas reverti non potest, ac ne mulsum quidem ad mel et vinum, vel emplastrum aut collyria ad medicamenta reverti possunt. Videntur tamen mihi *recte* quidam dixisse, *non debere dubitari*, quin *alienis spicis excussum frumentum ejus sit, cujus et spicæ fuerint*; quum enim grana, quæ spicis continentur, perfectam habeant suam speciem, qui excussit spicas, non novam speciem facit, sed eam, quæ est, detegit."

(*a*) § 25. J. 2. 1.—fr. 12. § 1. D. 41. (Callistratus) "Si ære meo et argento tuo conflato aliqua species facta sit, non erit ea nostra communis, quia, quum diversa materia æs atque argentum sit, ab artificibus separari, et in pristinam materiam reduci solet."—fr. 24. ibid. (Paulus) "In omnibus, quæ ad eandem speciem reverti possunt, dicendum est, si materia manente species duntaxat forte mutata sit, veluti si ex meo ære statuam, aut argento scyphum fecisses, me eorum dominum manere."—fr. 26. pr. ibid. (Idem) "Sed si ex meis tabulis navem fecisses, tuam navem esse, quia cupressus non maneret, sicuti nec lana vestimento facto, sed cupresseum aut laneum corpus fierit."—*Gaius*, II. 79.—*Theophilus* ad § 25. J. cit. "Ex aliena materia speciem quis fecit. Quæritur, quis speciei futurus sit dominus naturali ratione, utrum, qui materiam in speciem mutavit, an dominus materiæ etiam dominus speciei sit futurus? Veluti ex alienis medicamentis emplastrum aut collyrium composuit, vel ex alienis uvis aut olivis aut spicis vinum, aut oleum aut frumentum quis fecit, vel alieno auro aut argento aut ære vas fecit aliquis. Et fuerunt super his multæ contentiones Sabinianorum ac Proculianorum. Proculiani enim dicebant eum, qui speciem fabricasset, dominum fabricatæ rei fieri; Sabiniani autem dominum materiæ volebant dominum esse speciei. Exstitit porro tertia sententia quodammodo media, quæ aliquando Sabinianis, aliquando Proculianis consentit, quam et religiosissimus dominus noster elegit. Dicit enim tertia sententia, *si fabricata species resolvi potest in priorem materiam, et ex qua facta fuit, materiæ dominus etiam speciei erit dominus; si vero species in veterem materiam reverti non potest, eum, qui speciem fabricaverit, dominum esse rei confectæ.* Veluti in hac specie, ex massa æris, vel argenti vel auri confectum vas potest conflatum pristinam æris vel argenti vel auri formam reddere; ast vinum vel oleum vel frumentum in uvas vel olivas et spicas reverti non potest: immo neque mulsum et vinum resolvi potest. *Hæc quidem locum habent, ubi omnis materia aliena fuit. Si vero ex mea materia et tua speciem aliquam fecero*, veluti ex meo vino ac tuo melle mulsum aut ex medicamentis meis et tuis emplastrum, aut ex mea lana et tua vestim: in hac specie *non est controversum, eum esse dominum, qui fecerit*, non enim suum modo operam in speciem impendit, sed et partem materiæ præbuit."

(*b*) The specificator has on that account a right of retention, but only as long as he is in possession of the new species, and an *exceptio doli* against the owner's *rei vindicatio*. arg. § 30. 32. 33. 34. J. 2. 1.—fr. 23. § 4. D. 6. 1. (Paulus) "In omnibus igitur istis causis, in quibus mea res per prævalentiam alienam rem trahit, meamque efficit, si eam rem vindicem, per exceptionem doli mali cogar pretium ejus quod accessit, dare."—The specificator who had acted mala fide has no claim to compensation for his labour. arg. § 30. J. 2. 1.

(*c*) In the time of Gaius (*Gaius*, II. 79.—§ 25. J. 2. 1.) the threshing of corn belonging to another was considered as a case of specification; but it was no longer regarded as

ownership, it is here of no consequence whether he acted *bona* or *mala fide*.[a] But as respects the *indemnification* of the former proprietor of the material, the specificator, if he acted *bona fide*, needs to make good the loss only in so far as he has become richer thereby;[b] if on the contrary he acted *mala fide*, he is under liability, like a thief, to make full compensation for damage.[c]

C. Accessio.

§ 266. The so-called *accessio* is that mode of acquisition whereby, according to the rule, *Res accessoria sequitur rem principalem* or *cedit rei principali*, the proprietor of the principal thing becomes *ipso jure* proprietor also of all that belongs to the principal as an accessory thing.[d] This mode of acquisition comprises very many cases, which may be reduced to the following two classes, viz. those in which a thing would otherwise be ownerless, and those in which a thing formerly owned by another is acquired by the proprietor of the principal thing through its accession to the same.[e]

1. Cases of the First Class.

§ 267. The cases of the first class come under the principle, that the proprietor of a thing acquires *ipso jure* the property of all the organic products of the same, and of all that without exertion on his part accrues to it from without, so as to form a part of the same. This principle applies to the following cases: 1. The proprietor of a thing acquires the property of its *fruits* at the moment of their production (*Fructus pendentes pars fundi sunt*),[f] so too the *young of animals*, and among

such in the time of Justinian, fr. 7. § 7. D. 41. 1. and it does not therefore now produce property on the part of the thresher. *Koch*, l. c. § 6.—*Hofacker*, Principia. § 953.

(*a*) § 26. J. 2. 1. which is not in conflict with fr. 12. § 3. D. 10. 4. (Paulus) "Si quis ex uvis meis mustum fecerit, vel ex olivis oleum, vel ex lana vestimenta, quum sciret hæc aliena esse, utriusque nomine ad exhibendum actione tenebitur, *quia quod ex re nostra fit, nostrum esse, verius est*."—fr. 53. § 14. D. 47. 2. (Ulpianus) "Si quis massam meam argenteam surripuerit, et pocula fecerit, possum vel poculorum vel massæ furti agere, vel condictione. Idem est in uvis, et in musto, et in vinaceis; nam et uvarum, et musti, et vinaceorum nomine furti agi potest, sed et condici."—*Seuffert*, Erört. II. p. 17.—*Koch*, l. c. § 9. Another opinion is entertained by *Schweppe*, Röm. Priv. R. Vol. 2. § 241.—*Unterholzner*, Verjährung. Vol. 1. p. 235.—*Sell*, l. c. Vol. 1. No. 5.

(*b*) arg. fr. 14. D. 12. 6. (Pomponius) "Nam hoc natura æquum est, neminem cum alterius detrimento fieri locupletiorem."—fr. 31. § 3. D. 5. 3. (Ulpianus) "Sicut autem sumtum, quem fecit, deducit, ita si facere debuit, nec fecit, culpæ hujus reddet rationem, nisi bonæ fidei possessor est; tunc enim, quia quasi suam rem neglexit, nulli querelæ subjectus est ante petitam hereditatem; postea vero et ipse prædo est."

(*c*) *Gaius*, II. 79.—arg. § 26. J. 2. 1.—fr. 52. § 14. D. 47. 2.—*Koch*, l. c. § 11. 12.—*Thibaut*, System. 7th. Ed. § 595 in fine.

(*d*) *Gesterding*, l. c. § 25–29. and especially *Wächter* in Weiske's Rechtslexicon sub voce: Accession.—The Romans did not use the word *accessio* to denote the title arising from the addition of one thing to another, but understood by it the *thing* itself which comes to be joined to another. (§ 153.)

(*e*) The common division of *accessio* into *naturalis*, *industrialis*, and *mixta*, is not Roman, nor is it correct. See *Guyet*, Abhandl. p. 246.

(*f*) fr. 44. D. 6. 1. (Gaius) "Fructus pendentes pars fundi videntur."—fr. 25. pr. D. 22. 1. (Julianus) "Qui scit, fundum sibi cum alio communem esse, fructus, quos ex eo per-

the Romans the *children of female slaves* irrespective of the father (*Partus sequitur ventrem*).[a] 2. When a stream makes a gradual *deposit* (*alluvio*) on a piece of ground, the proprietor of the land becomes also proprietor of the soil thus deposited.[b] 3. When in the middle of a stream there arises an *island* cohering with the ground (*insula in flumine nata*), those who own the lands opposite to it on each side of the river become also proprietors of the island, each as far as his lands extend along the bank, up to a line drawn through the middle of the stream; but when the island arises on one or the other side of this middle line, the owners of the bank next to which it arises become proprietors of the same, that is to say as far as their adjacent lands extend.[c] 4. When *a stream deserts its channel*, and leaves its bed dry (*alveus derelictus*), the proprietors of the adjacent lands divide the old bed of the stream, as in the case of a newly arisen island.[d] But when on the contrary a piece of land is converted into an island by a new arm of the

ceperit invito vel ignorante socio. non majore ex parte suos facit, quam ex qua dominus prædii est. Nec refert, ipse, an socius, an uterque eos severit, quia omnis fructus non jure seminis, sed jure soli percipitur, et quemadmodum si totum fundum alienum quis sciens possideat, nulla ex parte fructus suos faciet, quoque modo sati fuerint, ita qui communem fundum possidet, non faciet fructus suos pro ea parte, qua fundus ad socium ejus pertinebit."

(*a*) § 19. J. 2. 1.—fr. 5. § 2. D. 6. 1. (Ulpianus) "Idem (Pomponius) scribit: si equam meam equus tuus prægnantem fecerit, non esse tuum, sed meum, quod natum est."—const. 7. C. 3. 32. "Partum ancillæ matris sequi conditionem, nec statum patris in hac specie considerari, explorati juris est."—fr. 28. D. 22. 1. (Gaius) "In pecudum fructu, etiam fœtus est, sicut lac, et pilus, et lana. Itaque *agni, et hædi, et vituli statim pleno jure sunt bonæ fidei possessoris et fructuarii.* § 1. Partus vero ancillæ in fructu non est, *itaque ad dominum proprietatis pertinet.* Absurdum enim videbatur, hominem in fructu esse, quum omnes fructus rerum natura hominum gratia comparaverit."

(*b*) *Gaius.* II. 70.—§ 20. J. 2. 1.—fr. 7. § 1. fr. 16. fr. 56. D. 41. 1.—const. 3. C. 7. 41.—*Gesterding* in the Archiv Civ. Prax. Vol. 3. p. 68. and in his Nachforschungen. Vol. 3. p. 360.

(*c*) § 22. J. 2. 1.—fr. 7. § 3. fr. 29. fr. 30. § 2. D. 41. 1.—fr. 65. § 4. D. 41. 1. (Labeo) "Si id quod in publico innatum aut ædificatum est, publicum est, insula quoque quæ in flumine publico nata est, publica esse debet."—fr. 1. § 6. D. 43. 12. (Ulpianus) "Si insula in publico flumine fuerit nata, inque ea aliquid fiat, non videtur in publico fieri. Illa enim insula occupantis est, si limitati agri fuerunt, aut ejus, cujus ripam contingit, aut, si in medio alveo nata est, eorum est, qui prope utrasque ripas prædia possident."—*Gaius*, II. 72. "At si in medio flumine insula nata sit, *hæc eorum omnium communis est, qui ab utraque parte fluminis prope ripam prædia possident.* Si vero non sit in medio flumine, ad eos pertinet, qui ab ea parte quæ proxuma est, juxta ripam prædia habent."—*Köchy*, Civ. Erört. Collect. 1. No. 1.—*Polack*, Mathesis forensis. 3d Ed. p. 216. 4th Ed. Leipsic, 1770. 242 seqq.

(*d*) § 23. J. ibid.—fr. 7. § 5. D. 41. 1.—fr. 30. D. 41. 1. (Pomponius) § 1. "Celsus filius, si in ripa fluminis, quæ secundum agrum meum sit, arbor nata sit, meam esse ait, quia solum ipsum meum privatum est, usus autem ejus publicus intelligitur. Et ideo cum exsiccatus esset alveus, proximorum fit, *quia jam* populus eo non utitur. § 2. Tribus modis insula in flumine fit: uno cum agrum, qui alvei non fuit, amnis circumfluit; altero, cum locum, qui alvei esset, siccum relinquit et circumfluere cœpit; tertio, cum paulatim colluendo locum eminentem supra alveum fecit et eum alluendo auxit. Duobus posterioribus modis privata insula fit ejus, *cujus ager propior fuerat, quum primum exstitit*; nam et natura fluminis hæc est, ut cursu suo mutato alvei causam mutet, nec quidquam interest, utrum de alvei duntaxat solo mutato, an de eo, quod superfusum solo et terræ sit, quæritur: utrumque enim ejusdem generis est. Primo autem illo modo causa proprietatis non mutatur."—const. 1. C. 7. 41. "Quamvis fluminis naturalem cursum opere manu facto alio non liceat avertere, tamen ripam suam adversus rapidi amnis impetum munire prohibitum non est. Et cum fluvius priore alveo derelicto alium sibi facit, ager, quem circumit, prioris domini manet. Quodsi paulatim ita auferat, ut alteri parti applicet, *id alluvionis jure ei quæritur, cujus fundo accrescit.*"—Comp. *Höpfner*, Comm. 8th Ed. § 310 seqq.

river, it remains to its former proprietor; so too in the case of a mere overflow.[a] 5. Even *treasure trove* must be reckoned here, inasmuch as one half of it is regarded as an accession, while the other half is disposed of on the principle of the occupancy of ownerless things; so that one half goes to the owner of the soil, and the other half to the finder.[b]

2. Cases of the Second Class.

a. Adjunctio. (c)

§ 268. The cases of the second class rest on the principle, that when a thing is connected with another in such a manner that a separation cannot be effected at all, or at least not without injury to one or the other, the proprietor of the principal thing becomes also proprietor of the accessory one connected therewith.[d] To this class belongs especially the so-called *adjunctio*, whereby two things belonging to different proprietors are brought into firm connexion with each other. Single kinds of it are: *interweaving* (*intextura*);[e] *welding together*

(*a*) § 24. J. 2. 1. "Alia sane causa est, si cujus totus ager *inundatus* fuerit; neque enim inundatio fundi speciem commutat, et ob id, si recesserit aqua, palam est, *fundum ejus manere, cujus et fuit.*"—const. 3. C. 7. 41. (*Impp. Theodosius et Valentinianus AA. Cyro Pf. P.*) "*Ea quæ per alluvionem*, sive in Ægypto per Nilum, sive in aliis provinciis per diversa flumina possessoribus acquiruntur, neque ab ærario vendi, neque a quolibet peti, nec separatim censeri vel functiones exigi, hac perpetuo valitura lege sancimus, ne vel alluvionum ignorare vitia, vel rem noxiam possessoribus videamur inducere. Similiter nec ea quidem, quæ paludibus antea vel pascuis videbantur adscripta, si sumtibus possessorum nunc ad frugum fertilitatem translata sunt; vel vendi, vel peti, vel quasi fertilia separatim censeri vel functiones exigi concedimus: ne doleant diligentes operam suam agri dedisse culturæ, nec diligentiam suam sibi damnosam intelligant. Hujus legis temeratores quinquaginta librarum auri condemnatione coërceri decernimus. Inter quos habendum est officium quoque tuæ sedis excelsæ, si aliquid hujusmodi suggesserit disponendum, vel si preces introduxerit petitoria." *Dated Constantinople, A. D.* 440.—See also fr. 7. § 6. D. 41. 1.—fr. 1. § 9. D. 43. 12.

(*b*) const. un. C. 10. 15.—*Gesterding*, Eigenthum. § 17.

(*c*) *Gesterding*, l. c. § 30–34.

(*d*) Wherever a separation is practicable, the former proprietor of the accessory thing may bring an *actio ad exhibendum* for the separation of the things connected, and then vindicate that which belongs to him. fr. 6. D. 10. 4. (Paulus) "Gemma inclusa auro alieno, vel sigillum candelabro, vindicari non potest, sed ut excludatur ad exhibendum agi potest. Aliter atque in tigno juncto ædibus, de quo nec ad exhibendum agi potest, quia lex duodecim tabularum solvi vetat; sed actione de tigno juncto ex eadem lege in duplum agitur."—fr. 7. § 1. ibid. (Ulpianus) "Sed si rotam meam tuo vehiculo aptaveris, teneberis ad exhibendum, (et ita Pomponius scribit), quamvis tunc civiliter non possideas."—fr. 23. § 5. D. 6. 1. (Paulus) "Item quæcunque aliis juncta sive adjecta accessionis loco cedunt, ea, quamdiu cohærent, dominus vindicare non potest, sed ad exhibendum agere potest ut separentur, et tunc vindicentur; scilicet excepto eo, quod Cassius de ferruminatione scribit. Dicit enim: si statuæ suæ ferruminatione junctum brachium sit, unitate majoris partis consumi, et quod semel alienum factum sit, etiamsi inde abruptum sit, redire ad priorem dominum non posse. Non idem est in eo, quod adplumbatum sit, quia ferruminatio per eandem materiam facit confusionem, plumbatura vero non idem efficit. Ideoque in omnibus his casibus, in quibus neque ad exhibendum, neque in rem locum habet, in factum actio necessaria est. At in his corporibus, quæ ex distantibus capitibus essent, constat, singulas partes retinere suam propriam speciem: ut singuli homines, singulæ oves; ideoque posse me gregem vindicare, quamvis aries tuus sit immixtus, sed et te arietem vindicare posse. Quod non idem in cohærentibus corporibus eveniet; nam si statuæ meæ brachium alienæ statuæ addideris, non posse dici, brachium tuum esse, quia tota statua uno spiritu continetur."

(*e*) § 26. J. 2. 1.

(*adferruminatio*);[a] *painting* (*pictura*), in which the picture,[b] and *writing* (*scriptura*),* in which the materials are regarded as the principal thing;[c]

(*a*) fr. 23. § 5. D. 6. 1. (quoted above, p. 281. note *d*.).

(*b*) § 34. J. 2. 1. "Ridiculum est enim, picturam Appellis vel Parrhasii in accessionem vilissimæ tabulæ cedere."—fr. 9. § 2. D. 41. 1.—fr. 23. § 3. D. 6. 1. (Paulus) "Sed et id, quod in charta mea scribitur, aut in tabula pingitur, statim meum fit, licet de pictura quidam contra senserint, propter pretium picturæ; sed necesse est, ei rei cedere id, quod sine illa esse non potest."—*Gaius*, II. 78. "Sed si in tabula mea aliquis pinxerit velut imaginem, contra probatur: magis enim dicitur, tabulam picturæ cedere. Cujus diversitatis vix idonea ratio redditur. Certe secundum hanc regulam, si me possidente petas. imaginem tuam esse, nec solvas pretium tabulæ, poteris per exceptionem doli mali summoveri. At si tu possideas, consequens est, ut utilis mihi actio adversum te dari debeat: quo casu, nisi solvam impensam picturæ, poteris me per exceptionem doli mali repellere; utique si bona fide possessor fueris. Illud palam est, quod sive tu subripuisses tabulam sive alius, competit mihi furti actio."—*Marezoll* in Löhr's Mag. Vol. 4. p. 366. and *Zimmern* in Schunck's Jahrb. Vol. 1. p. 74.

(*c*) § 33. J. 2. 1.—fr. 9. § 1. D. 41. 1.—*Gaius*, II. 77. "Eadem ratione probatum est. quod in chartulis sive membranis meis aliquis scripserit, licet aureis literis, meum esse, quia literæ chartulis sive membranis cedunt. Itaque si ego eos libros easque membranas petam, nec impensam scripturæ solvam. per exceptionem doli mali summoveri potero."—*Konopak*, Institutionen. § 288.—*Marezoll*, Instit. 2d Ed. § 86.

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* The ideas of the Romans respecting property in productions of the mind were very imperfect and contracted. It has indeed been attempted to defend the notions of the Roman jurists with respect to property in writings and paintings, by assuming that they held painting to be a sort of specification. But this is not correct; for the Roman jurists regarded it in the light of an accession, and their dispute only related to the question whether the painting or the material was to be considered as the *principal* thing; this Justinian decided in favour of the former, while with respect to writing he says in the Institutes (§ 33. J. 2. 1.), "Literæ quoque, *licet aureæ sint*, chartis membranisve cedunt." The original leading principle followed by the Roman jurists in deciding as to what was to be considered as the principal and what as the accessory thing, was this: accessory things are such as serve for the completion or embellishment of another thing, even though the former be of far greater value than the latter. From this principle a deviation was made in favour of painting, "*ob pretium picturæ*." But as every picture is not by an Apelles, and as there is no conceivable good ground to justify a difference of legislation between a picture and a writing, solely on account of the inferiority of calligraphy as compared with painting, this decision is an indefensible anomaly founded on an intrinsic contradiction. The fact that Egyptian papyrus was of much greater value among the Romans than paper is with us, cannot decide either one way or the other, for "*minima non curat prætor*," and where cognizance is to be taken of matters of importance, the absurdity lies in entirely overlooking the author's right in the production of his mind, and subjecting the corporeal thing to which it is affixed, to the principles of mechanical adjunction. If unfortunately a bill of exchange or a document, not to speak of a scientific treatise, a musical composition, or a poetical effusion, should by accident be written upon paper belonging to another, the author would often be placed in the most unhappy predicament, if the owner of the paper could at once vindicate the same. And still our modern jurists for the most part assert the applicability of this principle (*Höpfner*, Commentar. Edited by A. D. Weber, 8th Edition. p. 235 seqq.), and the same view is taken by our Author in the text; and all for the simple reason that Justinian, probably smitten with the desire of playing the amateur of art, did not hesitate to give a blow to science, by saying: "Si in chartis membranisve tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius, sed tu dominus esse judiceris." (§ 33. J. 2. 1.) The German practice however is against the application of the principle in question, as is testified by many of the older as well as later jurists, and among the latter by Thibaut, who says: "As the absurdity of this legal rule is sufficiently obvious, our practitioners have always limited the principle with respect to writing, when what is written has a particular value for the writer; it is also customary to apply similar restrictions to Justinian's precepts concerning painting."

and especially *building* (*inædificatio*), in which according to the rule, "*Solo cedit quod solo inædificatur*," the proprietor of the soil becomes also proprietor of the building erected upon it;[a] and *sowing* and *planting* (*satio et plantatio*), in which according to the rule, "*Solo cedit quod solo implantatur*," the proprietor of the soil becomes also the proprietor of the seed, the plant, and the tree, as soon as these have taken root.[b] Under this class we may also place *avulsio*, that is an adjunction produced by a stream of water carrying away a large piece of a person's land at once, and depositing it on that of another; in which case the proprietor of the latter acquires the property of the piece of land thus torn away, as soon as it adheres fast to his own.[c]

Compensation for Loss by Adjunction.

§ 269. The person who has acquired by adjunction something formerly belonging to another, is in many cases obliged to compensate the latter for the damage which he has suffered in consequence of his loss. We must distinguish here the following cases:

1. An adjunctor who has brought an accessory thing belonging to another into connexion with his own principal thing, acquires the property of such accessory thing. Here all depends on whether he regarded the accessory thing, at the time when he brought it into connexion with his own, *bona fide* as belonging to himself; for if he undertook the adjunction *bona fide*, he needs only to compensate the former

(*a*) *Gaius*, II. 73. "Præterea id, quod in solo nostro ab aliquo ædificatum est, quamvis ille suo nomine ædificaverit, jure naturali nostrum fit, quia superficies solo cedit."—§ 29. 30. J. 2. 1.—fr. 23. § 6. D. 6. 1.—fr. 6. D. 10. 4. —fr. 1. D. 47. 3. (Ulpianus) "LEX DUODECIM TABULARUM neque solvere permittit tignum furtivum ædibus vel vineis junctum neque vindicare. Quod providenter lex effecit, ne vel ædificia sub hoc prætextu diruantur, vel vinearum cultura turbetur; sed in eum, qui convictus est junxisse, in duplum dat actionem. § 1. Tigni autem appellatione continetur omnis materia, ex qua ædificium constet, vineæque necessaria Unde quidam aiunt: tegulam quoque, et lapidem, et testam, ceteraque, si qua ædificiis sunt utilia (tigna enim a tegendo dicta sunt), hoc amplius et calcem et arenam, tignorum appellatione contineri. Sed et in vineis tigni appellatione omnia vineis necessaria continentur, utputa pertice, pedamenta. § 2. Sed et ad exhibendum danda est actio; nec enim parci oportet ei, qui sciens alienam rem ædificio inclusit junxitve; non enim sic eum conveniemus, quasi possidentem, sed ita, quasi dolo malo fecerit, quominus possideat."

(*b*) § 31. 32. J. 2. 1.—fr. 7. § 13. D. 41. 1. (Gaius) "Si alienam plantam in meo solo posuero, mea erit: ex diverso si meam plantam in alieno solo posuero, illius erit, si modo utroque casu radices egerit; antequam enim radices egerit, illius permanet, cujus et fuit. His conveniens est, quodsi vicini arbor ita terram meam presserit, ut in meum fundum radices egerit, meam effici arborem; rationem enim non permittere, ut alterius arbor intelligatur, quam cujus in fundo radices egisset. Et ideo prope confinium arbor posita, si etiam in vicinum fundum radices egerit, communis est."—fr. 9. pr. D. ibid. (Idem) "Qua ratione autem plantæ, quæ terra coalescunt, solo cedunt, eadem ratione frumenta quoque quæ sata sunt, solo cedere intelliguntur. Ceterum sicut is, qui in alieno solo ædificavit, si ab eo dominus soli petat ædificium, defendi potest per exceptionem doli mali: ita ejusdem exceptionis auxilio tutus esse poterit, qui in alienum fundum sua impensa consevit. — *Gaius*, II. 74–76. Concerning *trees growing on boundaries*, see fr. 19. pr. D. 10. 3.—fr. 83. D. 17. 2.

(*c*) *Gaius*, II. 71.—§ 21. J. 2. 1.—fr. 7. § 2. D. 41. 1.—*Gesterding*, l. c. § 26. and in the Archiv Civ. Prax. Vol. 3. p. 70.—*Köchy*, Civ. Erört. No. 1.—*K. S. Zachariä*, Ueber die durch die Ueberschwemmung fortgerissenen Sachen. Wittenberg, 1799.—*Du Caurroy*, Interprétation du § 21. J. de rer. div. (2. 1.) in the Thémis. Vol. 6. p. 143.—*Gesterding*. Nachforschungen. Vol. 3. p. 363.—*Marezoll*, l. c.

proprietor to the extent to which he has become richer thereby.[a] If on the other hand he effected the adjunction *mala fide*, he is, like a thief, unconditionally liable for a full compensation for damages.[b] It is only with respect to *inædificatio* that the peculiar rule obtains, that the owner of materials which have been worked up into another's building, does not lose his property in them: still he cannot vindicate them as long as the building stands (*Tignum cedit solo*); but he may bring the *actio de tigno juncto* for double their value, whether the builder acted *bona* or *mala fide*.[c]

2. An adjunctor who has brought *his own* accessory thing into connexion with a principal thing belonging to another, loses thereby the property of the thing formerly belonging to himself. Here likewise all depends on whether he has acted *in bona* or *mala fide*. If he acted *in bona fide*, as long as he is in possession, he can exercise a right of retention until he is indemnified, and may protect himself by the *exceptio doli* against the proprietor's vindication; but if he be no longer in possession, he has no action according to the Roman law.[d] If on the contrary he acted *in mala fide*, he loses his property, and is not entitled to any compensation;[e] unless the thing connected by him must be considered as *impensæ necessariæ* (§ 155), in which case he will be allowed an *actio in factum* for compensation.[f]

3. An adjunction brought about by natural events, e. g. by *avulsio* (§ 268 in fine), is to be treated as an accident; and consequently he who gains thereby is not obliged to make compensation to the loser.[g]

(*a*) fr. 5. § 3. D. 6. 1. (Ulpianus) "De arbore, quæ in alienum agrum translata coaluit, et radices immisit, Varus et Nerva utilem in rem actionem dabant; nam si nondum coaluit, mea esse non desinit."—fr. 23. § 5. ibid. (quoted above, p. 281. note *d*.)

(*b*) § 26. J. 2. 1.—fr. 52. § 14. D. 47. 2.

(*c*) § 29. J. 2. 1.—fr. 7. § 10. D. 41. 1.—fr. 23. § 6. D. 6. 1.—fr. 6. D. 10. 4.—fr. 1. D. 47. 3.—const. 2: C. 3. 32.—*Gesterding*, Eigenthum. § 30.

(*d*) § 33. 34. J. 2. 1. See on the latter *Marezoll* in Löhr's Mag. Vol. 4. p. 366.—*Gaius*, II. 76–78.—fr. 23. § 4. D. 6. 1.—*Francke*, Beiträge zur Erläuterung verschiedener Rechtsmaterien. Vol. 1. No. 2.

(*e*) § 30. 34. J. 2. 1.—fr. 7. § 12. D. 41. 1.

(*f*) const. 5. C. 3. 32. (*Imp. Gordianus A. Herasiano*) "Domum, quam ex matris successione ad te pertinere et ab adversa parte injuria occupatam esse ostendis, Præses provinciæ cum pensionibus, quas percepit aut percipere poterat, et omni causa damni dati restitui jubebit. Ejus autem, quod impendit, rationem haberi non posse, merito rescriptum est, quum malæ fidei possessores ejus, quod in rem alienam impendunt, non eorum negotium gerentes, quorum res est, nullam habeant repetitionem, nisi necessarios sumtus fecerint. Sin autem utiles, licentia eis permittitur, sine læsione prioris status rei eos auferre." *Dated Febr. A. D.* 239.—See above, § 155.

(*g*) Many jurists hold a different opinion; but their views are not supported by the following passages, to which they refer, and which speak only of *artificial* adjunction. § 31. J. 2. 1.—fr. 5. § 3. fr. 23. § 4. 5. D. 6. 1.—fr. 7. § 13. D. 41. 1.—fr. 26. § 2. D. ibid. (Paulus) "Arbor radicitus eruta et in alio loco posita, priusquam coaluerit, prioris domini est; ubi coaluerit, agro cedit, et si rursus eruta sit, non ad priorem dominum revertitur; nam credibile est, alio terræ alimento aliam factam."—*Köchy*, Civ. Erört. p. 13. and especially: *Guyet*, Abh. p. 246 seqq.—*Thibaut* and *Sell* hold that the principle applying to LOCUPLETATIO (*Nemo cum damno alterius locupletior fieri debet*) should always determine whether a compensation is to be made. The arguments adduced by *Thibaut* (Braun's Erörterungen. p. 507 seqq.) appear to be decisive. The conclusion at which he arrives is, that the adjunctor may claim compensation from the owner of the principal thing by means of the *exceptio doli*, and the owner of the accessory thing may recover his damages from the adjunctor by an *actio in factum*; and that equity requires, that compensation should likewise be made, in

*b. Commixtio and Confusio.**

§ 270. The mixing together of things solid or dry (*commixtio*)[a] or of things liquid (*confusio*) which belong to different owners, has no effect upon their rights in the things, if the latter can be separated.

If on the other hand such separation is *not practicable*, then:

1. The former proprietors of the things now connected will be joint owners *of the whole*, whenever the mixture has been made with the consent of both parties, or by accident; or whenever things homogeneous in their nature have been mixed by one of the parties without the consent of the other.[b]

2. The *commixer* of homogeneous things will become owner only in the single case where he has mixed with his own the money which he has received in payment or as a loan.[c]

The commixer who without the other party's consent transforms things heterogeneous in their nature, by mixing them into a new species, does indeed acquire the ownership; still as this is not a case of commixture, but of specification,[d] the principles that apply to the latter must decide here also. K.

cases where the adjunction is produced by natural events.

(*a*) The later jurists understand by *miscere* or *commiscere* only the mixing of *dry* things, and by *confundere* only the mixing of *liquids*; but the Romans used these terms promiscuously. fr. 3. § 2. fr. 5 pr. § 1. D. 6. 1. (quoted in next note.)—fr. 7. § 8. D. 41. 1.—*Buchholtz*, Versuche. No. 10.

(*b*) § 28. J. 2. 1.—fr. 5. pr. D. 6. 1. (Ulpianus) "Idem Pomponius scribit: '*Si frumentum duorum non voluntate eorum confusum sit, competit singulis in rem actio in id, in quantum paret in illo acervo suum cujusque esse.' Quodsi voluntate eorum commixta sunt, tunc communicata videbuntur, et erit communi dividundo actio.*"—§ 27. J. 2. 1.—fr. 7. § 8. 9. D. 41. 1.—fr. 3. § 2. D. 6. 1. (Idem) "Pomponius scribit: 'Si quid, quod ejusdem naturæ est, ita confusum est atque commixtum, ut deduci et separari non possit, non totum, sed pro parte esse vindicandum.' Utputa meum et tuum argentum in massam redactum est; erit nobis commune, et unusquisque pro rata ponderis, quod in massa habemus, vindicabimus, etsi incertum sit, quantum quisque ponderis in massa habeat."

(*c*) fr. 78. D. 46. 3. (Javolenus) "Si alieni nummi inscio vel invito domino soluti sunt, manent ejus, cujus fuerunt: *si mixti essent ita, ut discerni non possent, ejus fieri qui accepit*, in libris Gaii scriptum est; ita ut actio domino cum eo, qui dedisset, furti competeret."—Comp. fr. 11. § 2. D. 12. 1.

(*d*) fr. 5. § 1. D. 6. 1. (Ulpianus) "Idem [Pomponius] scribit: 'Si ex melle meo et vino tuo factum sit mulsum, quosdam existimasse, id quoque communicari.' Sed puto

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* For the sake of preserving simplicity, where there is no real ground for distinction, the Editor, instead of treating of *commixtio* and *confusio* separately, as is done by our Author, has endeavoured to combine the rules common to them both—a mode which is pursued by Thibaut and others.

We will take this opportunity to note the distinction between *specificatio*, *adjunctio*, *commixtio*, and *confusio*. *Specification* is the acquisition of ownership in a new species, produced by changing the form of a thing belonging to another, and especially by transforming another's rough materials into a new shape; hence it would certainly have been more reasonable to regard painting and writing as a sort of specification. Different from this is *accession*, by means of which property is acquired not in consequence of a new form given to the thing, but in consequence of the connexion into which one thing is brought with another. The distinctions between *adjunctio*, *commixtio*, and *confusio*, are these: *adjunction* produces a connected, solid whole (e. g. the welding on of another's iron to one's own steam-engine); *confusion* likewise produces a connected whole, which however is fluid; and lastly, *commixture* produces a whole which is not fluid, and whose particles are not united.

D. Adjudicatio.

§ 271. *Adjudicatio*, or the adjudging of the ownership of a thing by a court, takes place in the three actions for partition, viz. the *judicium familiæ herciscundæ* (action for the partition of an inheritance), *communi dividundo* (action for the partition of joint property or other real rights), and *finium regundorum* (action for settling disputed boundaries). In these actions the judge has the right to adjudge to one or the other co-heir or part-owner the exclusive proprietorship of a thing hitherto held in common; and his judgment transfers *ipso jure* the property in the thing adjudged,[a] provided the latter has heretofore actually been the joint property of the litigants, and has not belonged say to a third person.[b] *

E. Traditio.

1. Its Nature.

§ 272. *Delivery* (*traditio*),[c] as a mode of acquiring property, rests on the principle, that the right of property is transferred to a person, by the owner's giving up the possession of the thing, with the intention of transferring to the receiver the ownership of the same,[d] and by the receiver's taking the possession with the intention of acquiring the ownership.[e]

verius, ut et ipse significat, ejus potius esse, qui fecit, quoniam speciem pristinam non retinet. Sed si plumbum cum argento mixtum sit, quia deduci potest, nec communicabitur, nec communi dividundo agetur (quia separari potest), agetur autem in rem actione. Sed si deduci, inquit, non possit, utputa si æs et aurum mixtum fuerit, pro parte esse vindicandum. Nec quaquam erit dicendum, quod in mulso dictum est, quia utraque materia, etsi confusa, manet tamen."—fr. 12. § 1. D. 41. 1.—§ 25. J. 2. 1.

(*a*) *Ulpian*, XIX. 16. "Adjudicatione dominia nanciscimur per formulam FAMILIÆ HERCISCUNDÆ, quæ locum habet inter COHEREDES; et per formulam COMMUNI DIVIDUNDO, cui locus est inter SOCIOS; et per formulam FINIUM REGUNDORUM, quæ est inter VICINOS. Nam si judex uni ex heredibus aut sociis aut vicinis rem aliquam adjudicaverit, statim illi acquiritur, sive mancipi sive nec mancipi sit."—§ 4–7. J. 4. 17.—const. 3. C. 3. 37.

(*b*) fr. 17. D. 41. 3. According to the rule: *Inter alios acta et judicata aliis non nocent.* —Cod. 7. 60.

(*c*) *Donelli* Comm. jur. civ. Lib. 4. c. 15–20. —*Gesterding*, Eigenthum. § 20–23.—*Glück*, Comm. Vol. 8. p. 580–582.

(*d*) const. 20. C. 2. 3. "*Traditionibus et usucapionibus* dominia rerum, NON NUDIS PACTIS transferuntur." An exception is made by many jurists with respect to churches, charitable institutions, and municipal communities; but the opinion that these corporate bodies acquire the property without its delivery, is not supported by const. 23. § 1. C. 1. 1. to which they refer.—*Thibaut* in the Archiv Civ. Prax. Vol. 20. p. 1.

(*e*) fr. 55. D. 44. 7. (Javolenus) "In omnibus rebus, quæ dominium transferunt, concurrat oportet affectus ex utraque parte contrahentium. Nam sive ea venditio, sive donatio, sive conductio, sive quælibet alia causa contrahendi sit, nisi animus utriusque consentit, perduci ad effectum id, quod inchoatur, non potest."

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* As a general rule, the judicial decision gives to the successful party in the suit no real right in the thing adjudged to him, but only a personal right against the defeated party. It is only in the three proceedings for partition, above enumerated, that the rule suffers an exception, as the judgment establishes here a right of ownership for the party to whom it is adjudged. Hence the decision in this case is termed *adjudicatio*, instead of *sententia*.

2. Its Requisites.

§ 273. In order to effect a transfer of the right of property to another, it is requisite on the part of the deliverer that he should be the actual proprietor of the thing, and have the right of free disposal of the same. Accordingly an alienation and delivery undertaken by a non-dominus, does not effect a right of ownership on the part of the receiver;[a] still it will produce this effect, in case the alienator on his part should afterwards acquire the right of property,[b] or should for a special reason be entitled to alienate the thing belonging to another.[c] An alienation and delivery, on the contrary, although performed by the actual proprietor of the thing, is and continues to be of none effect and altogether invalid, if he has not the right to dispose of the same.[d]

§ 274. Moreover, to effect the transfer of property to another, there must be a *justa causa*[e] in accordance with which the delivery may take place;[f] that is, it must be preceded by a legal transaction which gives the receiver a right to claim the ownership of the thing,[g] or by some

(*a*) According to the principle laid down by Ulpian in fr. 54. D. 50. 17. "Nemo plus juris ad alium transferre potest, quam ipse haberet."—fr. 20. pr. D. 41. 1. He to whom a thing is transferred by a non-dominus, acquires a possessio ad usucapionem provided he is *in bona fide*. An exception to this rule is made in regard to the ruling prince and his consort; since their grantee acquires directly the right of property in things belonging to third persons, whose only remedy is an action against the *fiscus* to be instituted within four years. § 14. J. 2. 6. —const. 3. C. 7. 37.—*Seuffert*, Erörterungen. Divis. II. p. 21.—*Rosshirt*, Gemeines Deutsches Civilrecht. Vol. 2. p. 251.

(*b*) fr. 42. D. 41. 3. At the same time the alienator, in case he himself attempts to vindicate the thing, would be defeated by the *exceptio rei venditæ et traditæ*. fr. 1. pr. fr. 2. D. 21. 3.—fr. 72. D. 6. 1.—fr. 17. D. 21. 2.

(*c*) pr. J. 2. 8. "Accidit aliquando, ut, *qui dominus non sit*, alienandæ rei potestatem habeat;" for instance the mortgagee or pawnee.—§ 1. J. ibid. fr. 46. D. 41. 1. (Ulpianus) "Non est novum, ut qui dominium non habeat, alii dominium præbeat. Nam et creditor pignus vendendo causam dominii præstiat, quam ipse non habuit."—const. 5. C. 8. 16. "Quum res, quæ necdum in bonis debitoris est, pignori data ab eo, postea in bonis ejus esse incipiat, ordinariam quidem actionem super pignore non competere, manifestum est, sed tamen æquitatem facere, ut facile utilis persecutio exemplo pignoratitiæ detur."

(*d*) pr. J. 2. 8. "Et contra (accidit aliquando), ut *qui dominus sit*, alienare non possit." Thus e. g. the husband is not entitled to alienate the *fundus dotalis*, even although his wife consents that he should do so; in like manner the ward is not allowed to sell things belonging to him, without his tutor's authority (*sine tutoris auctoritate*). § 2. J. ibid.—fr. 6. D. 45. 1.

(*e*) *Donelli* Comm. jur. civ. Lib. 4. c. 16.—*Warnkönig* in the Archiv Civ. Prax. Vol. 6. p. 111.—*Schweppe*, Röm. Priv. R. Vol. 2. § 242. —*Seuffert*, Erörterungen. Divis. I. p. 23.

(*f*) Wherever such *justa causa* is wanting, tradition does not transfer the right of ownership. fr. 31. pr. D. 41. 1. (Paulus) "Nunquam nuda traditio transfert dominium, sed ita, *si venditio aut aliqua justa causa præcesserit*, propter quam traditio sequeretur."

(*g*) In the case of a contract *of sale* however, the purchaser does not acquire the right of property by mere tradition, unless he has paid the price or bought upon credit. § 41. J. 2. 1.—fr. 19. D. 18. 1. (Pomponius) "Quod vendidi [et tradidi] non aliter fit accipientis, *quam si aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emtori sine ulla satisfactione*."—fr. 53. D. ibid. (Gaius) "Ut res emtoris fiat, *nihil interest, utrum solutum sit pretium, an eo nomine fidejussor datus sit*. Quod autem de fidejussore diximus, plenius acceptum est: *qualibet ratione* ‖si‖ *venditori de pretio satisfactum est*, veluti expromissore aut pignore dato, perinde sit ac si pretium solutum esset."—fr. 5. § 18. D. 14. 4. (Ulpianus) "Sed si dedi mercem meam vendendam, et exstat, videamus, ne iniquum sit, in tributum me vocari? *Et si quidem in creditum ei abiit, tributio locum habebit*; enimvero si non abiit, *quia res venditæ non alias desinunt esse meæ, quamvis vendidero, nisi ære soluto, vel fidejussore dato, vel alias satisfacto*, dicendum erit, vindicare me posse."—fr. 11. § 2. D. 19. 1.

other fact expressive of the grantor's intention to transfer the ownership of the thing to the other.[a] All that is required, therefore, is that both the grantor and the receiver should at the time of the delivery act with this intention; and hence it is of no consequence, as far as the transfer is concerned, whether or not both the parties had the same *causa* in mind,[b] or whether or not the agreement itself—or in a contract of sale the credit given—was obtained by fraud.[c]

3. Mode of Performance.

§ 275. The object of delivery is, to convey to the receiver the dominion over the thing, i. e. to enable him to exercise juridical power over the thing by affording him the physical power over it. Hence it follows that the delivery must be considered as complete, as soon as the receiver is enabled to exercise physical power over the thing. The manner in which this is done is entirely immaterial in a juridical point of view (§ 240). Accordingly delivery is effected,[d] 1. when the grantor places the moveable thing in the hand of him who is to receive

(*a*) For instance: § 40. 46. J. 2. 1.—fr. 9. § 7. D. 41. 1. (Gaius) "Hoc amplius interdum et in incertam personam collata voluntas domini transfert rei proprietatem, ut ecce qui missilia jactat in vulgus; ignorat enim, quid eorum quisque excepturus sit, et tamen quia vult, quod quisque exceperit, ejus esse, statim eum dominum efficit."—fr. 5. § 1. D. 41. 7. (Pomponius) "*Id quod quis pro derelicto habuerit, continuo meum fit*, sicuti cum quis ea sparserit aut aves emiserit; quamvis enim incertæ personæ voluerit eas esse, tamen ejus fient, cui casus tulerit ||[qui eas sustulerit]||, *easque quum quis pro derelicto habeat, simul intelligitur voluisse alicujus fieri.*"—fr. 3. § 1. D. 44. 7. (Paulus) "Non satis autem est, dantis esse nummos et fieri accipientis, ut obligatio nascatur, sed etiam *hoc animo dari et accipi, ut obligatio constituatur*. Itaque si quis pecuniam suam *donandi causa* dederit mihi, quanquam et donantis fuerit, et mea fiat, tamen non obligabor ei, quia non hoc inter nos actum est."

(*b*) fr. 36. D. 41. 1. (Julianus) "Cum *in corpus quidem, quod traditur*, consentiamus, *in causis vero* dissentiamus, non animadverto, cur inefficax sit traditio; veluti si ego credam, me ex testamento tibi obligatum esse, ut fundum tradam, tu existimes ex stipulatu tibi eum deberi. Nam et si pecuniam numeratam tibi tradam donandi gratia, tu eam quasi creditam accipias, constat, *proprietatem ad te transire, nec impedimento esse, quod circa causam dandi atque accipiendi dissenserimus.*"—fr. 18. D. 12. 1. (Ulpianus) "Si ego pecuniam tibi quasi donaturus dedero, tu quasi mutuam accipias, Julianus scribit, donationem non esse. Sed an mutua sit? videndum. Et puto, nec mutuam esse, *magisque nummos accipientis non fieri, quum alia opinione acceperit. Quare si eos consumserit, licet condictione teneatur, tamen doli exceptione uti poterit, quia secundum voluntatem dantis nummi sunt consumti.* § 1. Si ego quasi deponens tibi dedero, tu quasi mutuam accipias, nec depositum, nec mutuum est. Idem est, et si tu quasi mutuam pecuniam dederis, ego quasi commodatum ostendendi gratia accepi. Sed in utroque casu *consumtis nummis, condictioni sine doli exceptione locus erit.*" See on both these passages *Regenbrecht*, Comm. ad L. 36. D. de acquirendo rerum dominio et L. 18. D. de rebus creditis. Berlin, 1820.—*Glück*, Comm. Vol. 4. p. 152. Vol. 8. p. 121.—*Thibaut*, System. 7th Ed. § 301–304.

(*c*) fr. 11. § 5. D. 19. 1. (Ulpianus) "Si quis virginem se emere putasset, quum mulier venisset, *et sciens errare eum venditor passus sit*, redhibitionem quidem ex causa non esse, verumtamen ex emto competere actionem ad rescindendam emtionem, ut pretio restituto mulier reddatur."—const. 10. C. 4. 44. "Dolus emtoris qualitate facti, non quantitate pretii æstimatur. Quem si fuerit intercessisse probatum, non adversus eum, in quem emtor dominium transtulit, rei vindicatio venditori, sed contra illum, cum quo contraxerat, *in integrum restituto competit.*" fr. 13. § 27. 28. D. 19. 1.—fr. 9. § 3. D. 41. 1. —const. 5. 10. C. 4. 44. See also fr. 4. § 27–32. D. 44. 4.—*Heise* and *Cropp*, Jurist. Abh. Vol. 2. p. 281.—*Francke* in the Archiv Civ. Prax. Vol. 16. p. 428.—*Weber*, Beiträge zu der Lehre von Klagen und Einreden. No. 1. p. 84.

(*d*) Although the principles applicable to the apprehension of possession stated above (§ 240) are essentially the same as those which apply to the apprehension of property, yet for the sake of greater plainness we will follow our Author in recapitulating them here.

it; 2. when the grantor conducts him to the piece of land, or merely shows it to him from its vicinity or from a distance, at the same time declaring that he means to convey to him the possession of the same;[a] 3. when he lays down the moveable thing before the receiver, or upon his order in his house (*longa manu*);[b] 4. when the grantor gives the thing to another, to whom the receiver wishes to have it given (*brevi manu*);[c] 5. when he who already holds possession of the thing in the name of another is from a *justa causa* enabled to continue the possession as proprietor, so that a giving and returning are unnecessary;[d] which compendious delivery is now likewise termed a *traditio brevi manu* (§ 247); 6. when *vice versa* the former proprietor continues to possess in the name of another the thing which he possessed before in his own right; a case which, as we have stated above (§ 247), is now called a *constitutum possessorium*;[e] and, 7. when instead of handing over the thing itself, the delivery is made by giving up to the receiver that which enables him to take physical possession of the thing, as e. g. the key of the enclosure in which it is contained.[f] The modern jurists commonly see in this only a symbol of the thing to be given up; and hence they extend this mode of delivery, which they term *traditio symbolica*, also to other signs representative of the thing.[g] *

(*a*) fr. 18. § 2. D. 41. 2. (Celsus) "Si venditorem, quod emerim, deponere in mea domo jusserim, possidere me certum est, quanquam id nemo dum attigerit; *aut si vicinum mihi fundum mercatum venditor ex meaturre demonstret, vacuamque se possessionem tradere dicat*, non minus possidere cœpi, quam si pedem finibus intulissem."—fr 1. § 21. D. ibid.

(*b*) fr. 79. D. 46. 3. (See above, p. 248. note *f.*)—fr. 18. § 2. D. 41. 2. (See the preceding note.)

(*c*) fr. 15. D. 12. 1. (Ulpianus) "Singularia quædam recepta sunt circa pecuniam creditam. Nam si tibi debitorem meum jussero dare pecuniam, obligaris mihi, quamvis meos nummos non acceperis. Quod igitur in duabus personis recipitur, hoc et in eadem persona recipiendum est, ut, cum ex causa mandati pecuniam mihi debeas, et convenerit, ut crediti nomine eam retineas, *videatur mihi data pecunia, et a me ad te profecta*."—fr. 43. § 1. D. 23. 3.—fr. 3. § 12. D. 24. 1.—fr. 1. § 21. D. 41. 2. (See above, p. 248. note *f.*)—fr. 11. pr. D. 6. 2.

(*d*) fr. 9. § 1. D. 6. 2. (Ulpianus) "Si quis rem apud se depositam, vel sibi commodatam emerit, vel pignori sibi datam: *pro tradita erit accipienda. si post emtionem apud eum remansit*."—fr. 9. § 5. D. 41. 1. (See above, p. 250. note *a.*)—§ 44. J. 2. 1.—fr. 9. § 9. D. 12. 1. (Idem) "Deposui apud te decem, postea permisi tibi uti; Nerva et Proculus: etiam antequam movcantur, condicere quasi mutua tibi hæc posse, aiunt. Et est verum, ut et Marcello videtur: animo enim cœpit possidere; ergo transit periculum ad eum, qui mutuam rogavit. et poterit ei condici."

(*e*) const. 28. C. 8. 54.—const. 35. § 5. C. ibid.—fr. 18. pr. D. 41. 2. (See above, p. 240. note *b.*)—fr. 77. D. 6. 1.

(*f*) § 45. J. 2. 1.—fr. 9. § 6. D. 41. 1. (Gaius) "Item si quis merces in horreo repositas vendiderit, simul atque claves horrei tradiderit emtori, transfert proprietatem mercium ad emtorem."—fr. 1. § 21. in fin. D. 41. 2. (See above, p. 248. note *f.*)—fr. 74. D. 18. 1. (quoted above, p. 248. note *h.*)

(*g*) *Schmalz*, Handb. des Röm. Privatrechts. Konigsberg, 1801. § 199.—*Gesterding*, Eigenthum. p. 154.—*Savigny*, l. c. p. 208.

* According to the common law of Germany, the Roman principles of tradition are in force at the present day, even with respect to the transferring of lands. In most German states, however, there are particular laws which, for the purpose of securing the taxes, mortgages, and feudal or manorial burdens on land, require publicity of transfer, and to this end also the co-operation of the proper court (*forum rei sitæ*); which, for the sake of preserving the regularity of title, enters the transfer in the public registry of conveyances. This act before the court is termed *investiture* (*vestitura*, i. e. a formal investing with the possession). The principles of investiture are so different in the several states of Germany, that in some of them the transfer is not regarded as com-

*F. Prescription.**

I. Its Nature and Kinds.

§ 276. *Prescription* (*præscriptio acquisitiva*)[a] is that mode of acquisition whereby one becomes proprietor of a thing on the ground that he

(*a*) *Gaius*, II. 41–61.—*Ulpian*, XIX. 8.— 2. 6.—Dig. 41. 3–10.—Cod. 7. 26–40.—Nov. 22. *Paulus*, V. 2.—Cod. Theodos. IV. 13.—Inst. c. 24. Nov. 119. c. 7. Nov. 131. c. 6.—*Cujacii*

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plete until such investiture has taken place; while in others the omission of it is attended merely with certain prejudicial effects, and does not hinder the transfer of land by simple tradition.

* Some remarks have already been made (Editor's note to § 202) respecting *extinctive* prescription. It is proper, therefore, that we should also devote some attention to *acquisitive* prescription.

With the exception of acquisition by immemorial possession, the acquisition of property by prescription was originally unknown to the German law; for the earlier traces which it contains of a term consisting of a year and a day, after the expiration of which the claims of all others were excluded, has reference only to the limitation of actions: hence it was not until the diffusion of the Roman law that acquisitive prescription became general in Germany. Among the Romans, on the contrary, we find this title of acquisition recognised in the earliest times. To the better understanding of this doctrine therefore it will be well to make here a few historical observations, and especially to show in what the *usucapio*, the *præscriptio longi temporis acquisitiva*, and the *præscriptio actionum* consisted; for then it will be easy for the reader to separate the historical from the practical, and to comprehend the distinction that is still observed between ordinary and extraordinary prescription. *Usucapio* was brought by the Twelve Tables into the closest connexion with the *jus Quiritium*, so that it had effect only for Roman citizens: a non-Roman could not make use of it ("*Adversus hostem æterna auctoritas esto*"—and every *peregrinus* was originally considered as a *hostis*); accordingly it gave quirital ownership to the usucapient, and applied only to things subject to such ownership (and not e. g. to lands in the provinces). The time which it required was very short, viz. a possession of only two years for lands, and of but one year for moveable things. The prescriptive possession was termed *usus;* and the prescription itself, *usus auctoritas* or *usucapio*, or even simply *usus*. The general object of the Roman law in establishing the usucapio was, according to Gaius, "ne rerum dominia diutius in incerto essent."

By degrees however there was formed, after the analogy of usucapio, a prescription resting on the prætorian law, viz. the *longi temporis possessio s. præscriptio*. It owed its origin to the necessities of private intercourse and to the harsh and unreasonable effects of usucapio, which proceeded from its restricted nature with respect both to persons and things. For as the provinces increased, the protection of the possession of provincial lands held by strangers as well as Romans, must have become indispensable. He therefore who, during a long time—*per longum tempus* (afterwards for ten and *inter absentes* for twenty years)—had held uninterrupted possession of a piece of land in a province *bona fide et justo titulo*, received for his protection an exception (*præscriptis*), i. e. the right to protect himself, by an appeal to his long continued possession, against claims of ownership raised by others. Afterwards even an action was granted to him, viz. the *Publiciana actio*, to enforce his rights during the term of prescription against a third possessor who held by a weaker right; and the *rei vindicatio utilis* to enforce the same after the expiration of the term, he being then regarded as *dominus bonitarius*, against every third possessor. This two-fold kind of property, as also of property actions and prescription (*dominium quiritale* and *bonitarium*, *rei vindicatio* and *Publiciana in rem actio*, *usucapio* and *longi temporis præscriptio*) continued to exist after the close of the republic, and under the emperors down to the time of Justinian. The requisites of the *longi temporis præscriptio* agree in general with those of *usucapio;* thus they were likewise, *bona fides*, *justus titulus*, and *continua possessio* (the duration of which was afterwards fixed under the emperors at ten and *inter absentes* at twenty years). The effect of this prescription originally consisted only in producing an exception (and *præscriptio* originally means exception; comp. § 207). The princi-

has for a long time possessed it as his own.[a] This, according to the law of Justinian and the present common law of Germany, is either

Comm. ad tit. Dig. de usucapionibus. In his works. Vol. 1.—*Donelli* Comm. jur. civ. Lib. 5. cap. 4. 14–31. Lib. 11. c. 11. 12. — *Rave* de præscriptione. Jena, 1766. The latest (4th) edition published by Eichmann. Halle. 1790. — *Thibaut*, Ueber Besitz und Verjährung. Jena, 1802.—*Dabelow*, Ueber die Verjährung. 2 Vols. Halle, 1805. 1807.—*J. D. Wet* de usucapione et præscriptione secundum principia juris Romani. Leyden, 1810.—*Kori*, Theorie der Verjährung. (According to the German common and Saxon laws). Leipsic, 1811.—*Unterholzner*, Die Lehre von der Verjährung durch fortgesetzten Besitz. Breslau, 1815. —*Unterholzner*, Entwickelung der gesammten Verjährungslehre (The doctrine of *prescription*, according to the German common law). 2 Vols. Leipsic, 1828. This is the best of all the later works on the subject, and it is to it that our citations of "Unterholzner, Verjährung" refer. — *Gesterding*, Eigenthum. § 39.—*Ballhorn*, Ueber dominium. p. 233.—*Dupont*, Diss. de præscriptionibus secundum hodierni et Romani juris præcepta. Liege, 1823.—*Engelbach*, Ueber die Usucapion zur Zeit der XII Tafeln. Marburg, 1828.—*Reinhardt*, Die usucapio und præscriptio des Röm. Rechts. Stuttgart, 1832. (Reviewed in the Leipsic Lit. Zeit. for 1833. Nos. 52 and 53.)—*Hameaux*, Die usucapio und longi temporis præscriptio. Giessen, 1835. (Halle Lit. Zeit. for 1836. No. 126. p. 387.)—*Mühlenbruch*, Lehrbuch der Pand. § 261, note 9.

(*a*) fr. 3. D. 41. 3. (Modestinus) "*Usucapio* est adjectio dominii per continuationem possessionis temporis lege definiti."

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ples applying to *præscriptio* were entirely distinct from those to which *usucapio* was subjected. The latter, for instance, was interrupted only by an actual loss of possession, and not by the bringing of an action; and moreover it was held to be completed on the beginning of the last day ("*ultimus dies cœptus pro jam completo habetur*"). The principal distinction, however, naturally consisted in the difference of time required for the acquisition of property.

Under the emperors Honorius and Theodosius the younger (const. 3. C. 7. 39.) there arose a new kind of prescription, viz. the limitation of actions. It is true that already before their time, a few actions, especially prætorian actions (*actiones temporales*), had been limited, i. e. confined to a certain term; but the general rule was, that all actions were perpetual (*actiones perpetuæ*). The emperors Honorius and Theodosius, however, while they retained the *actiones temporales* with their old term of prescription, introduced for all other actions (for all *actiones perpetuæ*), real as well as personal, a term of prescription of thirty years, which was extended by Anastasius for certain cases (as e. g. for state and church property) to forty years (const. 4. C. 7. 39.). As the actions for enforcing the right of property were thus also subjected to limitation, the juridical possessor after the lapse of their term could defeat the proprietor by means of the *exceptio extinctæ actionis*; although he could not acquire the property itself, when his possession was defective with regard to either requisite of *longi temporis præscriptio*, and consequently could not vindicate the thing in case it had come into the possession of a third party.

Down to the time of Justinian, the distinction between civil-law and prætorian prescription still nominally survived; but when he abolished the distinction between quirital and bonitary ownership (as he did by const. un. C. 4. 25.), the peculiar legal principles which had previously been applied to the prescription of provincial landed property, lost their practical value. In order therefore to establish a uniformity in the doctrine of prescription, Justinian blended the two kinds of prescription *into one*, under the name of *longi temporis præscriptio*. Its conditions were these, that the prescriber must have acquired the juridical possession of a thing capable of prescription, in good faith and by virtue of a legal title, and must have held it during a certain time (viz. for moveables during three years, and for immoveables during ten and *inter absentes* during twenty years) in uninterrupted juridical possession. Justinian, who gives his ordinance (const. un. C. 7. 31.) the heading, "*de usucapione transformanda*," evidently merged *usucapio* in the *longi temporis præscriptio*; consequently the principles of the latter must always decide in cases of doubt, and the expressions *usucapio*, *usucapere*, &c. which are of frequent occurrence in the *Corpus Juris*, and still at the present day are often used by civilians, must not be allowed to mislead us into error. In consequence of this blending together of prescription and usucapio, the former was then

ordinary prescription (*usucapio* or *longi temporis possessio s. præscriptio*), which is completed in 3, 10, or 20 years;[a] or *extraordinary*, which is either limited to a certain period of time (*præscriptio* 30 *vel* 40 *annorum*, called *præscriptio longissimi temporis*), or is not, as *immemorial* prescription (*præscriptio immemorialis*).[b]

II. General Requisites.

§ 277. The following are the general requisites for all kinds of prescription:

1. The prescriber must continue uninterruptedly in juridical possession of the thing he wishes to acquire as his own (*continua possessio*).[c] An interruption of possession (*usurpatio*) occurs either when the possession is actually lost (*usurpatio naturalis*);[d] or when an action is

(*a*) This arose from the ancient civil usucapio and the prætorian longi temporis præscriptio being united by Justinian in his const. un. C. 7. 31. in such a manner that there was no longer any distinction between them. The ancient *usucapio* of the civil law (usus auctoritas) and the prætorian *longi temporis præscriptio*, as Dr. Rosshirt here remarks, were founded and developed on entirely different principles. Justinian combined both these institutions into one, but in so doing he did not expressly declare which was to be assimilated to the other, or in other words which set of principles should thereafter prevail. But when we consider that with respect to *immoveable* things the practice in Justinian's time followed the principles of *præscriptio* solely, and that Justinian expressed his intention to unite *usucapio* to *præscriptio*, it seems clear that the principles which apply to *præscriptio* must be preferred before those on which *usucapio* was founded. *Fritz* in the Z. f. Civ. R. u. Proc. Vol. 3. p. 435 seqq. Another opinion is maintained by *Wening*, System. § 130.—*Göschen*, l. c. p. 116. and *Hameaux* in his treatise cited p. 291. note *a*.

(*b*) Modern jurists commonly treat of this doctrine under the term *præscriptio*, and distinguish between the two following kinds: 1. *acquisitive* prescription of property and servitudes (among the Romans called *usucapio s. longi temporis possessio*); 2. *extinctive* prescription of servitudes and of other similar rights by non-user, as well as of actions by limitation. — *Ruff*, Diss. de differentia præscriptionis. Helmstedt, 1800.—*Pfeiffer*, Verm. Aufs. No. 7.—*Thibaut*, l. c. § 3.—*Unterholzner*, Verjährungslehre. Vol. 1. § 2. 3.

(*c*) fr. 25. D. 41. 3. (Licinius Rufinus) "Sine possessione usucapio contingere non potest."—*Majansii* Diss. de possessione ad usucapionem requisita; in Disputt. jur. civ. Vol. 2. No. 60.—*Unterholzner*, l. c. Vol. 2. § 183.

(*d*) fr. 2. D. 41. 3. (Paulus) "*Usurpatio est usucapionis interruptio. Oratores autem* usucapionem frequentem usum vocant."—fr. 5. ibid. (Gaius) "*Naturaliter interrumpitur possessio, cum quis de possessione vi dejicitur, vel alicui res eripitur*; quo casu non adversus eum tantum, qui eripit, interrumpitur possessio, sed adversus omnes. Nec eo casu quidquam interest, is qui usurpaverit, dominus sit, nec ne. Ac ne illud quidem

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granted with respect to all lands, and completed in ten, and *inter absentes* in twenty years, while with respect to moveable things its completion required only three years; the *accessio temporis* was transferred even to the prescription of moveables; and in accordance with all this, after the completion of the prescription, the possessor had not merely an *exceptio* as formerly, but the true ownership and a *rei vindicatio*.

As, however, Justinian considered himself bound to protect a long continued possession, in cases where the thing was incapable of the *longi temporis præscriptio*, or where the prescriber was not in condition to prove a *justus titulus* or *bona fides*, he introduced a new kind of prescription, viz. the extraordinary prescription of thirty years (*longissimi temporis præscriptio*), by erecting an acquisitive on the ground of the extinctive prescription. For the possessor obtained now even a *vindicatio* against every third person, while hitherto he had been protected against the proprietor's action merely by an *exceptio præscriptionis*, and was entirely defenceless in case he lost the possession.

instituted against the possessor,[a] or, in case of his absence, when a protest is entered against his right (*usurpatio civilis*).[b] In cases of civil usurpation, however, the interruption is effective only with respect to him who has brought the action or entered the protest; and accordingly the prescription continues its course undisturbed in relation to every other person.[c]

2. The possession must be a *bonæ fidei possessio*,[d] and must have lasted a certain time.[e] As regards the computation of the time of pos-

interest, pro suo quisque possideat, an ex lucrativa causa."—*Unterholzner*, l. c. Vol. 1. § 122–130. Vol. 2. § 186.—*Reinhardt*, l. c. p. 174.—*Savigny*, Besitz. 4th Ed. p. 233.—*Unterholzner*, l. c. Vol. 1. § 49. 50.—*Thibaut* in the Archiv Civ. Prax. Vol. 7. p. 20. and *Sintenis*, ibid. Vol. 20. p. 75.

(*a*) const. 10. C. 7. 32. "Nemo ambigit, possessionis duplicem esse rationem, aliam quæ jure consistit, aliam quæ corpore, utramque autem ita demum esse legitimam, *cum omnium adversariorum silentio et taciturnitate firmatur; interpellatione vero et controversia progressa, non posse eum intelligi possessorem*, qui licet possessionem corpore teneat, tamen ex interposita contestatione et causa in judicium deducta super jure possessionis vacillet ac dubitet."—const. 2. C. 7. 33. "Longi temporis præscriptio iis, qui bona fide acceptam possessionem et continuatam *nec interruptam inquietudine litis tenuerunt*, solet patrocinari."—const. 10. ibid. "*Nec bona fide possessionem adeptis longi temporis præscriptio post moram litis contestatæ completa proficit*, quum post motam controversiam in præteritum æstimetur." Comp. also: const. 1. C. 7. 33.—const. 3. C. 7. 40. —const. 2. C. 3. 19.—See above, § 203. and *Kind*, Quæstiones. 1st Ed. Vol. 4. c. 13. 2d Ed. Vol. 3. c. 32.—*Unterholzner*, l. c. Vol. 2. § 186.—*Fritz* in the Z. f. Civ. R. u. Proc. Vol. 3. p. 441. and *Buckholtz*, Versuche. No. 11.

(*b*) const. 2. 3. C. 7. 40. *Löhr* in his Mag. Vol. 4. p. 379.

(*c*) fr. 18. D. 6. 1.—const. 2. 3. C. 7. 40.

(*d*) *Majansii* Diss. de bona fide ad usucapionem requisita; in Disputt. Vol. 2. No. 62.—*Möllenthiel*, Ueber die Natur des guten Glaubens bei der Verjährung. Erlangen. 1820. —*Unterholzner*, l. c. Vol. 1. § 91–101. 117–121. Vol. 2. § 178. 179. 185. The Roman law requires only that the party who prescribes should have been in bona fide *at the commencement* of his possession (Mala fides superveniens non nocet). fr. 7. § 4. D. 41. 4. (Julianus) "Qui bona fide alienum fundum emit, et possessionem ejus amisit, deinde eo tempore apprehendit, quo *scit rem alienam esse, non capiet longo tempore, quia initium secundæ possessionis vitio non caret*; nec dissimilis est ei, qui emtionis quidem tempore putat fundum vendentis esse, sed quum traditur, scit alienum esse. Quum enim semel amissa fuerit possessio, initium rursus recuperatæ possessionis spectari oportet. Quare si *eo tempore redhibeatur homo, quo emtor scit alienum esse, usucapio non contingit*, quamvis ante, quam venderet, in ea causa fuerit, ut usucaperet. Idem juris est in eo, qui de fundo dejectus, possessionem per interdictum recuperavit, sciens jam alienum esse."—fr. 2. pr. D. ibid. (Paulus) "Pro emtore possidet, qui revera emit, nec sufficit, tantum in ea opinione esse eum, ut putet se pro emtore possidere, sed debet etiam subesse causa emtionis. Si tamen, existimans me debere, tibi ignoranti tradam, usucapies. Quare ergo, et si putem me vendidisse, et tradam, non capies usu? Scilicet quia in ceteris contractibus sufficit traditionis tempus. Sic denique si sciens stipuler rem alienam, usucapiam. si, quum traditur mihi, existimem illius esse; *at in emtione et illud tempus inspicitur, quo contrahitur*; igitur et bona fide emisse debet, et possessionem bona fide adeptus esse."—fr. 15. § 2. D. 41. 3. Except where he has acquired possession by purchase, in which case he must have been in bona fide at the time when the contract was made. fr. 48. D. 41. 3. fr. 2. pr. D. 41. 4. The canon law on the contrary requires him to have been in bona fide the *whole time* of prescription. cap. 20. X. 2. 26. (See above. § 202. note *i*.) "Unde oportet, ut qui præscribit. in nulla temporis parte rei habeat conscientiam alienæ." cap. 5. X. ibid. (See above, § 202. note *i*.)—cap. 2. de reg. jur. in 6to. (5. 12.) "Possessor malæ fidei ullo tempore, non præscribit."

(*e*) *Majansii* Diss. de tempore ad usucapionem statuto; in Disputt. Vol. 2. No. 63. The term of prescription varies. In the ordinary prescription the time is computed *civiliter*, i. e. the term is considered to be complete at the commencement of its last day. fr. 6. D. 41. 3. (Ulpianus) "In usucapionibus non a momento ad momentum, *sed totum postremum diem computamus*."—fr. 7. ibid. (Idem) "Ideoque qui hora sexta diei Kalendarum Januariarum possidere cœpit, hora sexta noctis pridie Kalendas Januarias implet usucapionem." — fr. 31. § 1. D. ibid. (Paulus) "In usucapionibus mobilium *continuum tempus* numeratur."—fr. 15. pr. D. 44. 3. (Venulcius) "In usucapione ita servatur, ut, etiam si minimo momento novissimi diei possessa sit res, nihilominus repleatur usucapio, *nec totus dies exigitur ad explendum constitutum tempus*." See above, § 187.

session, in case it has changed hands during the term of prescription, an *accessio possessionis s. temporis* may take place, i. e. the prescriber in computing the term may bring into account the time for which his predecessor held the possession.[a] In cases of universal succession, such *accessio possessionis* is imperative on the prescriber, i. e. the heir must allow this computation whether it be advantageous to him or not.[b] In cases of singular succession, on the contrary, the *accessio possessionis* depends on the prescriber's will; i. e. the singular successor may make use of it when he finds it to his advantage, viz. when both his predecessor's and his own possession have the requisites of prescription. If his predecessor's possession be not qualified for prescription, it cannot benefit him; but neither will it act to his prejudice, as it would in the case of a universal successor (an heir).[c]

3. The thing must be capable of prescription. Things absolutely incapable of prescription, are, properly speaking, none but those which are altogether excluded from traffic,[d] for the reason that they are not susceptible of private ownership. Things relatively incapable, i. e. incapable of prescription during a certain time, are the following:

(*a*) § 12. 13. J. 2. 6.—Dig. 44. 3.—*Majansii* Diss. de possessionum accessionibus utilibus; in Disputt. Vol. 2. No. 61.—*Unterholzner*, l. c. Vol. 1. § 132–134.—*Reinhardt*, l. c. 165 seqq.

(*b*) Hence an heir, according to the Roman law, could complete the prescription although he was *in mala fide*, if his testator had been *in bona fide* when he acquired possession (see p. 293. note *d.*); but not vice versa, i. e. not in case he was *in bona fide* and his testator *in mala fide*. § 12. J. 2. 6.—fr. 2. § 19. D. 41. 4. (Paulus) "*Si defunctus bona fide emerit, usucapietur res, quamvis heres scit alienam esse.* Hoc et in bonorum possessore, et in fideicommissariis, quibus ex Trebelliano restituitur hereditas, ceterisque prætoriis successoribus observatum est."—fr. 11. D. 44. 3. (Papinianus) "*Quum heres in jus omne defuncti succedit, ignoratione sua defuncti vitia non excludit*, veluti cum sciens, alienum illum ille, vel precario possedit; quamvis enim precarium heredem ignorantem non teneat, nec interdicto recte conveniatur, tamen *usucapere non poterit, quod defunctus non potuit.* Idem juris est, cum de longa possessione quæritur; neque enim recte defendetur, quum exordium rei bonæ fidei ratio non tueatur."—fr. 14. § 1. ibid. (Scævola) "Plane tribuuntur his, qui in locum aliorum succedunt, sive ex contractu, sive voluntate; *heredibus enim, et his, qui successorum loco habentur, datur accessio testatoris.*"—fr. 30. pr. D. 4. 6.—const. 11. C. 7. 32. "Vitia possessionum a majoribus contracta perdurant, et successorem auctoris sui culpa comitatur."—fr. 43. pr. D. 41. 3. (Papinianus) "Heres ejus, qui bona fide rem emit, usu non capiet sciens alienam, si modo ipsi possessio tradita sit; *continuatio vero non impedietur heredis scientia.*"

(*c*) A singular successor may therefore in such a case commence a prescription in his own person, provided he has a *bonæ fidei possessio.* fr. 13. § 10. D. 41. 2. (Ulpianus) "Sed et legatario dandam accessionem ejus temporis, quo fuit apud testatorem, sciendum est."—fr. 14. pr. D. 44. 3. (Scævola) "De accessionibus possessionum nihil in perpetuum, neque generaliter definire possumus; consistunt enim in sola æquitate. § 1. (*quoted* above, note *b.*) § 2. Itaque *si mihi* vendideris servum, *utar accessione tua.*"—§ 13. J. 2. 6.—fr. 13. § 10. D. 41. 2.—fr. 15. 16. D. 44. 3.—fr. 2. § 17. D. 41. 4. (Paulus) "Si eam rem, quam pro emtore usucapiebas, scienti mihi alienam esse vendideris, non capiam usu." (See above, § 202.)—const. 1. C. 7. 33. —const. 4. C. 7. 32. "Licet possessio nudo animo acquiri non possit, tamen solo animo retineri potest. Si ergo prædiorum desertam possessionem non derelinquendi affectione transacto tempore non coluisti, sed metus necessitate culturam eorum distulisti, præjudicium tibi ex transmissi temporis injuria generari non potest."—const. 11. C. 7. 33. "Super longi temporis præscriptione, quæ ex decem vel viginti annis introducitur, perspicuo jure sancimus, ut sive ex donatione, sive ex alia lucrativa causa bona fide quis per decem vel viginti annos rem detinuisse probetur, memorata longi temporis exceptio sine dubio ei competat, nec occasione lucrativæ causæ repellatur."

(*d*) § 1. J. 2. 6.—fr. 9. D. 41. 3. *De Retes* ad leges, edicta, constitutiones principum ex quibus prohibita usucapio est; in Meer-

viz. those which pertain to a dowry, since the wife is entitled to vindicate them in case of a divorce, or during the marriage, should her husband become insolvent;[a] the *adventitia* of children during their subjection to paternal power;[b] things belonging to wards and minors during their minority;[c] and lastly, things which have been stolen or robbed, as long as the *vitium rei inhærens* is not removed in one way or another.[d] In most of the cases enumerated, the prescription is rather suspended than excluded (*præscriptio dormit*).[e]

1. Special Requisites of Ordinary Prescription.

Besides the general requisites of every prescription mentioned above, the following are peculiar to ordinary prescription, viz. *res habilis, justus titulus*, and *tempus*.

man's Thes. Vol. 6. p. 461.—*Unterholzner*, l. c. Vol. 1. § 51–55.—*Thibaut*, System. 7th Ed. § 1023.

(*a*) const. 30. C. 5. 12. Many jurists allow this exception only with respect to *immoveables* belonging to a dower, and the ordinary prescription.—*Unterholzner*, l. c. Vol. 1. § 80. Vol. 2. § 180.—*Löhr* in the Archiv Civ. Prax. Vol. 10. p. 69.—*Buchholtz*, Jur. Abh. No. 11.

(*b*) const. 1. § 2. C. 7. 40.—Nov. 22. c. 24. in fine.—*Unterholzner*, l. c. Vol. 1. § 34. 81.

(*c*) const. 3. C. 7. 35. "Non est incognitum, *id temporis quod in minore ætate transmissum est*, longi temporis præscriptioni non imputari; ea enim tunc currere incipit, quando ad majorem ætatem dominus rei pervenerit." — "Accordingly after pupils and minors are of age," says Mackeldey, "things belonging to them are subject to *ordinary* prescription, for there is no law which excepts them from the latter any longer. Nevertheless, opinions on this subject differ greatly. The majority of jurists, and among them particularly *Thibaut* in his System (7th Ed. § 1047. 1052) and in the Archiv Civ. Prax. Vol. 9. p. 404. and *Pfeiffer* in his Prakt. Ausf. (Vol. 1. p. 19.), hold that during the time of tutelage things belonging to pupils are not subject to any prescription, and that things belonging to minors can never be acquired by any other than the 30 years' prescription. But const. 3. C. 7. 39. and const. 5. C. 2. 41., on which their opinion is said to be founded, do not speak at all of *acquisitive* prescription of things belonging to pupils and minors, but of the *limitation of their actions*; which latter is regulated by principles and periods of time entirely different from those that apply to the former. (Comp. § 202.)—*Fritz* in Löhr's Mag. Vol. 4. (2.) p. 284. and see in general: *Daniels*, Comm. de usucapione et præscriptione adversus pupillos et minores. Bonn, 1827.—*Unterholzner*, l. c. Vol. 1. § 35–38. and p. 533. —*Göschen*, Grundr. p. 118–123." Dr. Rosshirt, it seems to us, is quite right in rejecting this view of Mackeldey, which very erroneously denies the intrinsic connexion existing between limitation and the *longissimi temporis præscriptio acquisitiva*, and which at the same time entirely disagrees with a usage widely adopted in Germany. Dr. R. is of opinion that the *præscriptio longi temporis* runs neither against pupils nor minors, and that the *præscriptio longissimi temporis* likewise does not take place against pupils, though it does against minors, to whom even the benefit of restitution on this account is denied. Comp. *Mühlenbruch*, l. c. § 268. note 10.

(*d*) *Gaius*, II. 45. 49 seqq.—§ 2. 3. 4. J. 2. 6.—§ 8. J. ibid. "Aliquando etiam furtiva vel vi possessa res usucapi potest, veluti si in domini potestatem reversa fuerit; tunc enim, vitio rei purgato, procedit ejus usucapio."—fr. 4. § 6–18. D. 41. 3.—fr. 4. § 19. D. ibid. (Paulus) "Lana ovium furtivarum, si quidem apud furem detonsa est, usucapi non potest; si vero apud bonæ fidei emtorem, contra: quoniam in fructu est, nec usucapi debet, sed statim emtoris fit. Idem in agnis dicendum, si consumti sint; quod verum est. § 20. Si ex lana furtiva vestimentum feceris, verius est, ut substantiam spectemus; et ideo vestis furtiva erit. § 21. Si rem pignori datam debitor surripuerit et vendiderit, usucapi eam posse, Cassius scribit: quia in potestatem domini videtur pervenisse, qui pignori dedit, quamvis cum eo furti agi potest; quod puto rectius dici."—*Pulvæi* Lib. sing. ad Leg. Atiniam sive de rei furtivæ prohibita usucapione; in Otto's Thesaurus. Vol. 4. p. 327.—*De Retes*, l. c. (see p. 294. note *d*.)—*Majansii* Disputt. Vol. 2. Nos. 65–67.—*Ditmar*, Comm. ad Legis Atiniæ historiam et interpretationem. Heidelberg, 1818. *Unterholzner*, l. c. Vol. 1. § 59–71.

(*e*) const. 30. in fin. C. 5. 12.—const. 1. § 2. C. 7. 40.—const. 7. § 4. C. 7. 39.—cap. 14. X. 2. 26. "Licet tam legali, quam canonica sit definitione statutum, ut contra Romanam ecclesiam quæ gaudet privilegio speciali, non nisi centum annorum præscriptio locum sibi valeat vindicare: tempora tamen intercidentium schismatum, quæ secundum juris ordi-

a. Res habilis.

§ 278. The thing to be acquired by ordinary prescription must be *capable* of this kind of prescription.[a] Things incapable of it are: 1. those which belong to the property of the state and the private property of the ruler;[b] 2. immoveable things belonging to churches and charitable institutions, or to cities,[c] and according to the canon law all things belonging to the Romish church without distinction as to whether they are moveable or immoveable;[d] 3. things for which a suit has been commenced but is not continued, in so far as the parties are concerned;[e] 4. things the alienation of which is forbidden by law or by testament;[f] 5. immoveable things which a possessor alienates in bad faith without the previous knowledge of the proprietor; for if the latter, being cognizant of his right and of the alienation, suffers it to be done without protesting against it, the things are subject to ordinary prescription on the part of a third *possessor bonæ fidei*;[g] and lastly, 6. the *adventitia* of children, when alienated by the father after the termination of the paternal power,[h] as also the *lucra nuptialia* alienated by one of the parents, and the property in which has fallen to the children.[i]

The things here enumerated which are excepted from ordinary prescription may be acquired by extraordinary prescription of 30 or 40 years (§ 281).

nem cursum præscriptionis impediunt, nolumus aliquatenus computari, sed diligenti consideratione adhibita de ipsa computatione deduci."—cap. 10. 15. X. 2. 26.—*Marezoll* in the Z. f. Civ. R. u. Proc. Vol. 7. p. 274.—See also: const. 2. 3. C. 7. 40.

(*a*) The general as well as the special requisites of ordinary prescription are embraced in the following hexameter:

Res habilis, titulus, fides, possessio, tempus.

—*Unterholzner*, l. c. Vol. 1. § 40–47. § 56–58.

(*b*) § 9. J. 2. 6.—fr. 18. D. 41. 3. (Modestinus) "Quamvis *adversus fiscum usucapio non procedat*, si tamen ex bonis vacantibus, nondum tamen nunciatis, emtor prædii ex iisdem bonis exstiterit, recte diutina possessione capiet, idque constitutum est."—Cod. 7. 38.—const. 6. C. 7. 39.—const. 14. C. 11. 61.

(*c*) Nov. 131. cap. 6. compared with the earlier ordinances contained in const. 23. C. 1. 2. and Nov. 9. and 111. *Authent.* to const. 23. C. 1. 2. (Nov. 131. cap. 6.) "Quas actiones alias decennalis, alias vicennalis, alias tricennalis præscriptio excludit, hæ, si loco religioso competant, quadraginta annis excluduntur, usucapione triennii, vel quadriennii præscriptione in suo robore durantibus; sola Romana ecclesia gaudente centum annorum spatio vel privilegio."—*Buchholtz*, Jur. Abh. No. 29.—According to German practice, immoveables belonging to cities are also excepted from ordinary prescription. *Hofacker* in his Principia jur. civ. § 979.—*Thibaut*, System. § 1028.

(*d*) can. 17. C. 16. qu. 3. "Nemo de annorum numero resultandi sumat fomentum: quia sanctæ Romanæ (cui Deo auctore servimus) ecclesiæ privilegia, quæ in firma Petri stabilitatis petra suscepit, *nullis temporibus angustantur*, nullis regnorum portionibus præjudicantur. Sed et venerandæ Romanæ leges divinitus per ora *piorum* principum promulgatæ, rerum ejus præscriptionem non nisi per centum annos admittunt."—cap. 13. 14. 17. X. 2. 26.—cap. 2. de præscript. in 6to. (2. 13.)—*Thibaut*, Verjährung. § 29.

(*e*) const. 1. C. 7. 33. compared with const. 9. C. 7. 39.

(*f*) const. 1. C. 7. 26. "*Mancipia tua, si ab eis distracta sunt, qui jus vendendi non habuerunt, vindicare ea potes.* Nec enim usucapi ab emtoribus potuerunt, quum illicita venditione furtum contractum sit."—const. 2. ibid. "*Si contra defuncti voluntatem servos, quos* propter perfectæ artis peritiam *heredibus suis defunctus servari testamento præcepit, tutores vendiderunt, usucapi non potuerunt.*"—const. 3. § 3. C. 6. 43.—*Unterholzner*, l. c. Vol. 1. § 76.

(*g*) Nov. 119. c. 7.—Auth. *Malæ fidei.* C. 7. 33.—*Unterholzner*, l. c. § 76.

(*h*) For, during the continuance of paternal power, the *adventitia* are not subject to any prescription; but after its termination, the 30 years' prescription applies to them (§ 277 in fine).

(*i*) const. 6. § 4. C. 6. 61.—Nov. 22. c. 24.

b. Justus titulus.

§ 279. Another special requisite of ordinary prescription is the *justus titulus*;[a] that is, the possessor of the thing must have acquired the possession in a lawful manner, so that he is thereby entitled to consider himself the proprietor of the thing, or as the Romans express it, he must possess *bona fide pro suo* that which he possesses. Consequently the title must not rest on a transaction which is void or invalid.[b] An error on the part of the prescriber has different effects, according as the error relates to the thing itself, to his predecessor's person, or to his own title. 1. When the possessor is in error with respect to the *thing* to which his title relates, he cannot prescribe it.[c] 2. When he errs with respect to the *person* of his predecessor, he cannot prescribe, in case it be an *error juris*; but he can, in the case of an *error facti*.[d] 3. When he errs with respect to the *causa possessionis*, the prescription will hold good in case he has another actual title of his own;[e] but if he has no such other actual title, he cannot acquire the thing by prescription, at least not by ordinary prescription.[f]

(*a*) const. 24. C. 3. 32. "*Nullo justo titulo præcedente possidentes ratio juris quærere dominium prohibet.* Idcirco quum etiam usucapio cesset, intentio dominii nunquam absumitur. Unde hoc casu postliminio reverso, citra beneficium actionis rescissoriæ, directa permanet integra vindicatio."—const. 6. C. 7. 14. There are a great number of titles, e. g. the titulus pro suo, pro emtore, pro herede, pro donato, pro soluto, pro derelicto, pro legato, pro adjudicato, pro dote, etc. See in general: D. 41. 4–10.—*Majansii* Disputt. Vol. 2. No. 51–59.—*Seuffert*, Erört. p. 27.—*Unterholzner*, l. c. Vol. 1. § 102. 116. Comp. in particular on the *titulus pro herede*: *Elben*, Diss. de usucapione pro herede. Tubingen, 1823.—*Hartmann*, Diss. de titulo pro herede. Celle, 1823.—*Rosshirt* in the Archiv Civ. Prax. Vol. 9. No. 1.—*Arndts* in the Rhein. Mus. Vol. 1. p. 125.—*Unterholzner*, ibid. Vol. 5. p. 26.—*Göschen*, Grundriss. p. 125.—*Braun*, Erört. zu Thibaut's System. § 1050.—*Peucerus* de pro herede usucapionis natura. Jena, 1835.—*Fabricius* in the Rhein. Mus. Vol. 4. No. 2. p. 165.—*Arndts* in the Archiv Civ. Prax. Vol. 13. p. 283. and *Danz* in the Z. f. gesch. R. W. Vol. 5. p. 273.

(*b*) fr. 1. § 1. D. 41. 6. (Paulus) "Si pater filio, *quem in potestate habet*, donet, deinde decedat, *filius pro donato non capiet usu*, quoniam *nulla* donatio fuit."—fr. 26. pr. D. 24. 1.—fr. 44. D. ibid.—*Savigny* in the Z. f. gesch. R. W. Vol. 1. p. 270.—If on the contrary the transfer is valid in itself and only made *revocable*, it does not hinder the prescription. fr. 13. pr. D. 39. 6. (Julianus) "Si alienam rem *mortis causa donavero*, eaque usucapta fuerit, verus dominus eam condicere non potest, *sed ego, si convaluero*."—fr. 33. D. ibid. (Paulus) "Qui alienam rem mortis causa traditam usucepit, *non ab eo videtur accepisse, cujus res fuisset, sed ab eo, qui occasionem usucapionis præstitisset*."—*Löhr* in his Mag. Vol. 4. p. 137.

(*c*) fr. 2. § 6. D. 41. 4. (Idem) "Quum Stichum emissem, Dama per ignorantiam mihi pro eo traditus est. Priscus ait; *Usu me eum non capturum, quia id, quod emtum non sit, pro emtore usucapi non possit*; sed et si fundus emtus sit, et ampliores fines possessi sint, totum longo tempore capi, quoniam universitas ejus possideatur, non singulæ partes."

(*d*) fr. 31. pr. D. 41. 3. (Idem) "*Nunquam in usucapionibus juris error possessori prodest*, et ideo Proculus ait, si per errorem initio venditionis tutor pupillo auctor factus sit, vel post longum tempus venditionis peractum usucapi non posse, *quia juris error sit*."—fr. 2. § 15. D. 41. 4.

(*e*) fr. 31. § 6. D. 41. 3. (Idem) "Si defunctus *emit*, heres autem putat eum *ex donationis causa* possedisse, *usu eum capturum*, Julianus ait."—fr. 36. D. 41. 1. (Julianus) "Cum in corpus quidem, quod traditur, consentiamus, in causis vero dissentiamus, *non animadvertp, cur inefficax sit traditio*; veluti si ego credam, me ex testamento tibi obligatum esse, ut fundum tradam, tu existimes ex stipulatu tibi eum deberi. Nam et si pecuniam numeratam tibi tradam donandi gratia, tu eam quasi creditam accipias, constat, proprietatem ad te transire, *nec impedimento esse, quod circa causam dandi atque accipiendi dissenserimus*."

(*f*) This was not settled among the Roman jurists, as will be seen from a comparison of the following passages: fr. 27. D. 41. 3. (Ulpianus) "Celsus libro tricesimo quarto

c. Tempus.

§ 280. The possession must have lasted *three* years in the case of a moveable thing: in the case of an immoveable thing, *ten* years, when the parties had their domicile in the same province (*inter præsentes*); and *twenty* years when they resided in different provinces (*inter absentes*).[a] If they have been *absentes* during part of the time, the prescriber is still entitled to plead the prescription of ten years, subject however to this restriction, that in computing the time, every two years of *absentia* count only as one year towards making up the *decennium præsentiæ*.[b]

2. Extraordinary Prescription of 30 and 40 years.[c]

§ 281. When one of the special requisites of ordinary prescription is wanting, property may be acquired by extraordinary prescription; provided that the general requisites of every prescription exist (§ 277).[d] Such a special requisite is wanting: 1. when he who wishes to prescribe a thing in itself susceptible of prescription, is unable to prove any lawful title to it (§ 279); 2. when he can indeed show a lawful title, but the thing which he wishes to acquire is one that is excepted from ordinary prescription (§ 278).[e]

According to the Roman law, the extraordinary prescription of 30 or 40 years takes place even where both the requisites of ordinary prescription (i. e. *res habilis* and *justus titulus*) are wanting;

errare eos ait, qui existimarent, cujus rei quisque bona fide adeptus sit possessionem, pro suo usucapere eum posse, nihilque referre, emerit nec ne, donatum sit nec ne, si modo emtum vel donatum sibi existimaverit: *quia neque pro legato neque pro donato, neque pro dote usucapio valeat, si nulla donatio, nulla dos, nullum legatum sit.* Idem et in litis æstimatione placet, ut nisi vere quis litis æstimationem subierit, usucapere non possit."—fr. 6. D. 41. 7. (Julianus) "Nemo potest pro derelicto usucapere, qui falso existimaverit, rem pro derelicto habitam esse."—fr. 1. pr. D. 41. 6. (Paulus) "Pro donato is usucapit, cui donationis causa res tradita est; *nec sufficit opinari, sed et donatum esse oportet.*"—fr. 2. § 2. D. 41. 4. compared with fr. 3. 5. D. 41. 10.—fr. 48. D. 41. 3. Justinian however has approved of the negative in § 11. J. 2. 6.; a like decision was made before in two earlier ordinances by Diocletian and Maximian (viz. const. 4. C. 7. 29. and const. 4. C. 7. 33.). But according to the provision made by Justinian in const. 8. § 1. C. 7. 39. the possessor may acquire the thing by *extraordinary* prescription in the case proposed in the text, where the possessor has no title.—*Unterholzner*, l. c. Vol. 1. § 103 seq.

(*a*) const. 12. C. 7. 33.—const. un. C. 7. 31. —Nov. 119. c. 7.

(*b*) Nov. 119. c. 8.—*Hugo*, Civ. Mag. Vol. 5. p. 462.—*Unterholzner*, l. c. Vol. 1. § 84. Dr. Rosshirt gives his support to the views of some modern writers who hold that, with the exception of a mere temporary absence of one or both the parties while travelling, the *longum tempus* must consist of 20 years wherever a *continuum* of a presence of ten years cannot be shown. This, however, is wholly opposed to the prevailing opinion in the practice of Germany.

(*c*) *Pohl*, Diss. de fatis præscriptionis longissimi temporis. Leipsic, 1780. — *Koch*, Diss. de præscriptione longissimi temporis acquisitiva. Wurtzburg, 1807.—*Fritz* in the Z. f. Civ. R. u. Proc. Vol. 3. p. 435.

(*d*) Hence also in this prescription bona fides is requisite in order to acquire the property in the thing and therewith the rei vindicatio even after the expiration of the term of 30 or 40 years. One who is *in mala fide* will indeed acquire an exception against the owner's action, as it becomes extinct by limitation, but not the right of property nor the rei vindicatio. const. 8. § 1. C. 7. 39. compared with const. 3. ibid. (quoted above, p. 201. note *f.*) and Nov. 119. c. 7.—*Thibaut*, Verjährung. § 33.—*Unterholzner*, l. c. Vol. 1. § 91. Vol. 2. § 178.

(*e*) const. 8. § 1. C. 7. 39. and especially const. 14. C. 11. 61.

according to the canon law, property can be acquired in such a case only by immemorial prescription.[a]

Its Term.

§ 282. A term of *thirty* years is necessary, as a general rule, to establish extraordinary prescription. But by way of exception, a term of *forty* years is requisite to establish a prescription, 1. of property belonging to the state or to the ruler; 2. of immoveable things belonging to churches and charitable institutions (which is extended by the canon law in the case of the Romish church to one hundred years);[b] 3. of things belonging to cities;[c] and, 4. of things for which a suit has been commenced but not continued; in which last case, the defendant cannot acquire the thing in dispute until forty years after the last judicial act.[d]

3. Immemorial Prescription.

§ 283. Another and peculiar kind of extraordinary prescription is the *præscriptio immemorialis* of which mention is made in several passages of the Pandects.[e] It rests on the principle, that he who has been beyond the memory of man in the uninterrupted possession of a thing, or in the exercise of a right, is to be regarded as having lawfully

(*a*) const. 14. l. c. compared with cap. 1. de præscriptione in 6to. (2. 13.) "Episcopum, qui ecclesias, et decimas, quas ab eo repetis, proponit (licet in tua sint constitutæ diœcesi) se legitime præscripsisse, allegare oportet (cum jus commune contra ipsum faciat) hujusmodi præscriptionis titulum, et probare. Nam licet ei qui rem præscribit ecclesiasticam, si sibi non est contrarium jus commune, vel contra eum præsumtio non habeatur, sufficiat bona fides; ubi tamen est ei jus commune contrarium vel habetur præsumtio contra ipsum, bona fides non sufficit, sed est necessarius titulus, qui possessori causam tribuat præscribendi. Nisi tanti temporis allegetur præscriptio, cujus contrarii memoria non existat."

(*b*) Comp. § 278, notes *b. c. d. e.*

(*c*) *Hofacker*, Princ. jur. civ. § 979. and const. 14. C. 11. 61.

(*d*) const. 1. C. 7. 33. compared with const. 9. C. 7. 39.

(*e*) fr. 3. §. 4. D. 43. 20. (Pomponius) "Ductus aquæ. *cujus origo memoriam excessit*, jure constituti loco habetur." See also fr. 10. pr. D. 8. 5. (quoted above, p. 246. note *b.*) —fr. 2. pr. D. 39. 3. (Paulus) "In summa tria sunt, per quæ inferior locus superiori servit: lex, natura loci, *vetustas, quæ semper pro lege habetur*, minuendarum scilicet litium causa. § 1. Apud Labeonem proponitur fossa vetus esse agrorum siccandorum causa, *nec memoriam extare, quando facta esset*; hanc inferior vicinus non purgabat, sic fiebat, ut ex restagnatione ejus aqua fundo nostro noceret. Dicit igitur Labeo: aquæ pluviæ arcendæ cum inferiore agi posse, ut aut ipse purgaret, aut te pateretur in pristinum statum eam redigere. § 2. Præterea si in confinio fossa sit, neque purgari vicinus patiatur eam partem, quæ tibi accedat, posse te magis agere aquæ pluviæ arcendæ, Labeo ait. § 3. Cassius autem scribit: si qua opera, aquæ mittendæ causa, publica auctoritate facta sint, in aquæ pluviæ arcendæ actionem non venire; in eadem causa esse ea, *quorum memoriam vetustas excedat.* § 4. Apud Ateium vero relatum est: eam fossam, ex qua ad inferiorem fundum aqua descendat, cogendum esse vicinum purgare, *sive extet fossæ memoria, sive non extet*; quod et ipse puto probandum. § 5. Item Varus ait: aggerem, qui in fundo vicini erat, vis aquæ dejecit; per quod effectum est, ut aqua pluvia mihi noceret. Varus ait: si naturalis agger fuit, non posse me vicinum cogere aquæ pluviæ arcendæ actione, ut eum reponat vel reponi sinat. Idemque putat, et si manu factus fuit, *neque memoria ejus extat*; quodsi extet, putat aquæ pluviæ arcendæ actione eum teneri. Labeo autem, si manu factus sit agger, *etiam si memoria ejus non extet*, agi posse, ut reponatur; nam hac actione neminem cogi posse, ut vicino prosit, sed ne noceat, aut interpellet facientem, quod jure facere possit. Quanquam tamen deficiat aquæ pluviæ arcendæ actio, attamen opinor utilem actionem vel interdictum mihi competere adversus vicinum, si velim aggerem restituere in agro ejus, qui factus mihi quidem prodesse potest,

acquired the thing or the right itself.[a] It is therefore, properly speaking, nothing more than a presumption in favour of the lawfulness of the acquisition; and it is admitted subsidiarily in those cases where neither ordinary nor extraordinary prescription would be available.[b] It cannot well be proved otherwise than by witnesses who depose that they have neither seen aught to the contrary themselves, nor have heard aught to the contrary from their ancestors; for here the object of the prescriber is, to prove a perpetual usage or a perpetual exercise of a right, rather than to show the origin of the possession as the true basis of the establishment or extinction of a right.*

ipsi vero nihil nociturus est; hæc æquitas suggerit, etsi jure deficiamur. § 7. Idem Labeo ait: si in agro tuo aquarum concursus locum excaverit, aquæ pluviæ arcendæ actione agi non posse tecum a vicinis. Plane si fossa jure facta sit, aut cujus memoria non extet, agi tecum posse aquæ pluviæ arcendæ, ut reficias. § 8. Idem Labeo ait: cum quæritur, *an memoria extet facto opere*, non diem et consulem ad liquidum exquirendum, sed sufficere, si quis sciat factum, hoc est si factum esse non ambigatur; nec utique necesse esse, superesse qui meminerint, verum etiam si qui audierint eos, qui memoria tenuerint."—fr. 26. D. 39. 3. (Scævola) "Scævola respondit: solere eos, qui jure dicundo præsunt, tueri ductus aquæ, *quibus auctoritatem* VETUSTAS *daret*, tametsi jus non probaretur."—fr. 28. D. 22. 3. (Labeo) "Si arbiter animadvertere debeat, an operis facti memoria extet, hoc ei quærendum est: an aliquis meminerit, id opus factum esse? Paulus: immo, cum in arbitrio quæritur, memoria facti operis extet nec ne, non hoc quæritur, num aliquis meminerit, quo die aut quo consule factum sit, sed num hoc aliquo modo probari possit, quando id opus factum sit? et hoc ita, quod Græci dicere solent ἐν πλάτει; potest enim hoc memoria teneri, non intra annum puta factum, quum interim nemo sit eorum, qui meminerit, quibus consulibus id viderit. Sed cum omnium hæc est opinio, nec audisse, nec vidisse, quum id opus fieret, neque ex eis audisse qui vidissent, aut audissent, et hoc infinite similiter sursum versum acciderit, tum memoria operis facti non extaret."

(*a*) cap. 26. X. 5. 40. "— — — — Auctoritate apostolica duximus declarandum, illa esse prædagia, salinaria, guidagia interdicta, quæ non apparent imperatorum vel regum, vel Lateran. concilii largitione concessa, *vel ex antiqua consuetudine a tempore, cujus non extat memoria, introducta.*"—cap. 1. in 6to. (2. 13.)

(*b*) See on the whole doctrine especially *Thibaut*, Verjährung. § 74–85.—*Zimmern* and *Neustettel*, Römischrechtliche Untersuchungen. p. 129.—*De Ahlefeldt Laurvig*, Diss. de præscriptione immemoriali. Copenhagen, 1821.—*Kritz*, Abhandlungen über ausgewählte Materien des Civilrechts. Leipsic, 1824. No. 6.—*Unterholzner*, Verjährungslehre. Vol. 1. § 140–150. Vol. 2. § 299. 300.—*Pfeiffer*, Pract. Ausf. Vol. 2nd. p. 3.—*Heim*, Diss. de vera præscriptionis immemorialis indole. Marburg, 1828.—*Weiske* de probatione præscriptionis immemorialis; in his Quæst. jur. civ. Zwickau, 1831. p. 70.—*Schelling* (son), Die Lehre von der unvordenklichen Verjährung. Munich, 1835.—*Arndts* in his Abh. 1837.—*Buchka*, Der unvordenkliche Besitz des gemeinen deutschen Civilrechts. Heidelberg, 1841.—*Savigny*, System. Vol. 4. p. 480 seqq.—*Rosshirt*, Gem. Deutsch. Civ. R. Vol. 1. § 49.

* The traces of immemorial prescription to be found in the Roman law are but scanty; and the greater part of this doctrine as now used in Germany has been introduced by practice. The term *præscriptio immemorialis* (for which *præscr. indefinita* is now often used) does not appear in the Roman law, but was first employed by the glossators; the expressions by which it is denoted in the Corpus Juris, are: *vetustas, longævus usus, quod memoriam excedit, cujus origo memoriam excedit, contrarii memoria non extat.* Savigny (System. Vol. 4. Berlin, 1841. p. 481.) speaks in favour of the technical expression, *tempus immemoriale;* but learned practitioners have with more reason recommended the term, *possessio immemorialis.*

Every thing sanctioned by long usage was held peculiarly sacred by the Romans; and thus they regarded an old possession as in itself lawful by virtue of its long standing. On the same foundation the modern doctrine is based, viz. on the principle that the uninterrupted possession of a thing or the uninterrupted exercise of a right beyond the memory of man supplies the want of a legal title, and establishes the ownership or the right on the part of the possessor. Hence it follows necessarily, that the legislative aim

G. Acquisition of Fruits.[a]

§ 284. The principles which apply to the acquisition of property in the fruits of a thing belonging to another, differ according as the possessor of the thing is entitled to reap the fruits or not. Thus, supposing that,

I. *He is thus entitled.*[b] 1. Then, if he is not in juridical possession of the principal thing itself, e. g. as the usufructuary or tenant, he cannot acquire a property in the fruits otherwise than by *perception*, i. e. by taking possession of them; which, properly speaking, is nothing

(*a*) Concerning the *owner's* acquisition of the fruits of a thing belonging to him, see above, § 267.

(*b*) *Donelli* Comm. jur. civ. Lib. 4. c. 24–26. —*Galvanus* de usufructu. cap. 28.—*Frick* de jure bonæ fidei possessoris circa fructus e re aliena perceptos. Helmstedt, 1769.—*Trendelenburg*, Diss. de jure possessionis circa fructuum perceptionem. Kiel, 1775.—*Wolffradt*, Diss. sistens theoriam generalem de acquisitione fructuum. Gottingen, 1783.—*Arens*, Diss. de juris bonæ fidei possessori in fructus ex re aliena competentis legitimo fundamento. Giessen, 1803.—*Driessen*, Diss. de dominio seu jure possessoris in fructus bona fide perceptos non temporali. Groningen, 1803. — *Sceleres*, Diss. an bonæ fidei possessor fructus percipiendo vel consumendo suos faciat? In the Annals of the Academy. Louvain, 1827–29.—*Savigny*, Besitz. § 222.—*Eckenberg*, Diss. de Publiciana in rem actione. Leipsic, 1821. P. II. p. 37–68. —*Backe*, Diss. bonæ fidei possessor quemadmodum fructus suos facit. Berlin, 1825.—*Unterholzner* in the Archiv Civ. Prax. Vol. 8. p. 309.—*Tigerström* de ordine Digestorum. Berlin, 1829. p. 101 seqq. — *Warnkönig*, Comm. jur. civ. Vol. 1. p. 382. compared with the Thémis. Vol. 10. p. 89.—*Ferry*, ibid. p. 530. —*Buchholtz*, Versuche. No. 12.—*Mühlenbruch*, Pandecten. II. § 254.—*Thibaut*, System. 7th Ed. § 268. 601.

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of this prescription is no other than, out of regard for that which has long existed and in consequence of the presumption in favour of its lawful origin arising from this long continuance, to furnish protection to the same, in cases where the ordinary prescription or even that of thirty or forty years is inapplicable, on account either of the quality of the thing or of the want of a legal title (thus with respect to things, e. g. such as belong to the state or church; with respect to rights and privileges, e. g. servitudes and other real rights, and likewise the minor *jura regalia*, &c.). Here usually no regard is paid to *bona* or *mala fides* on the part of the possessor; because the presumption on which the whole doctrine rests is founded on a possession beyond the memory of man, whose origin and title have been lost from recollection.

The *thema probandum*, or matter to be proved, in such case is this, viz. that the condition in question has always so existed without interruption during the present generation and that immediately preceding it. Consequently, when witnesses are employed, as is commonly the case, their depositions, in order to be relevant, must go to prove, *positively* and from their own observation (*ex propria scientia*), that the state of things asserted by one of the parties has all along existed, as respects the present generation; and *negatively*, and from the observation of their forefathers (*de auditu*), that they have not heard from them that the state of the matters in question was ever otherwise, with respect to the preceding generation. The counter-proof of the adversary must on the contrary tend to show that in the time of the present or the preceding generation the state of things has not constantly been as represented by the other party.

The view adopted in the text, that both the proof and counter-proof can be effected only by means of witnesses, has never been adopted in German practice. This contracted idea which is entertained by some jurists has arisen solely from the fact that the laws in the examples given happen to speak of witnesses alone, but without on that account excluding documents and other means of proof. As regards witnesses, they are required to be fifty-four years of age; since the longest *præscriptio definita* is that of forty years, and the witness is capable of a degree of observation that will suffice for the purpose of giving testimony only after reaching the age of fourteen (age of puberty). But correct as this minimum may be, it must still depend on the nature of each particular case, whether a more advanced age is not requisite; since by all means the oldest people of the place who have knowledge of the matter are the most competent to make a deposition that will reach the furthest for the existing generation.

more than a delivery of the fruits on the part of the proprietor, and an apprehension of the same on the part of the acquirer.[a] 2. But if he is in juridical derivative possession of the principal thing itself, e. g. as emphyteuta (§ 241. note *a.*), he acquires the ownership of the fruits by the mere *separation* of the same; because on the part of a juridical possessor of the principal thing a special apprehension of the fruits is not necessary.[b]

II. *He is not entitled.* 1. If he is a possessor *bonæ fidei*, then by the mere separation of the fruits he acquires the ownership of the same: this ownership however is only of a provisional nature,[c] i. e. it may terminate by the proprietor's *vindicatio rei*, although like every other right of property it entitles the possessor to consume the fruits.[d] Accordingly when he is afterwards required by the proprietor to surrender the thing, he is not obliged to restore to the latter such fruits as he has already consumed or alienated, but he must surrender to the proprietor those which he has still on hand, unless he has acquired the property in them by prescription.[e] 2. If, on the contrary, he is possessor *malæ fidei*, he cannot acquire any property at all in the fruits, but must restore all *fructus percepti et percipiendi*, and is bound to make compensation for the *consumti*.[f]

(*a*) § 36. J. 2. 1.—fr. 12. § 5. D. 7. 1.—fr. 13. D. 7. 4. (Paulus) "*Si usufructuarius messem fecit, et decessit, stipulam, quæ demessa jacet, heredis ejus esse*, Labeo ait, spicam autem, quæ terra teneatur, domini fundi esse, fructumque percipi spica aut fœno cæso, aut uva ademta, aut excussa olea, quamvis nondum tritum frumentum, aut oleum factum, vel vindemia coacta sit. Sed ut verum est, quod de olea excussa scripsit, ita aliter observandum de ea olea, quæ per se deciderit. Julianus ait: *fructuaris fructus tunc fieri, quum eos perceperit*, bonæ fidei autem possessoris, mox quam a solo separati sint."

(*b*) fr. 25. § 1. in fin. D. 22. 1.

(*c*) fr. 48. pr. D. 41. 1. (Paulus) "Bonæ fidei emtor non dubie percipiendo fructus etiam ex aliena re suos interim facit non tantum eos, qui diligentia et opera ejus pervenerunt, sed omnes; quia, quod ad fructus attinet, loco domini pæne est. Denique etiam priusquam percipiat, statim ubi a solo separati sunt, bonæ fidei emtoris fiunt. Nec interest, ea res, quam bona fide emi, longo tempore capi possit nec ne, veluti si pupilli sit, aut vi possessa, aut Præsidi contra legem repetundarum donata, ab eoque abalienata sit bonæ fidei emtori."—fr. 49. § 6. D. 47. 2. (Ulpianus) "Ex furtivis equis nati statim ad bonæ fidei emtorem pertinebunt: merito, quia in fructu numerantur; at partus ancillæ non numerantur in fructu."—fr. 4. § 19. D. 41. 3. (quoted above, p. 295. note *d.*)—fr. 25. § 1. D. 22. 1.—fr. 28. D. 22. 1. (quoted above, p. 280. note *a.*)—fr. 13. D. 7. 4. (quoted above, note *a.*)

(*d*) § 35. J. 2. 1.—§ 2. J. 4. 17.—fr. 4. § 2. D. 10. 1. (Paulus) "Post litem autem contestatam etiam fructus venient in hoc judicio (scil. *finium regundorum*); nam et culpa et dolus exinde præstantur. Sed ante judicium percepti non omnimodo in hoc judicium venient; *aut enim bona fide percepit, et lucrari eum oportet, si eos consumsit*, aut mala fide, et condici oportet."—fr. 40. in fin. D. 41. 1.

(*e*) const. 22. C. 3. 32. "Certum est, malæ fidei possessores omnes fructus solere cum ipsa re præstare, bonæ fidei vero extantes, post autem litis contestationem universos." See also the passages referred to in the preceding note. Dr. Rosshirt erroneously objects to the theory adopted in the text, that the prescription of the fruits relieves the *bonæ fidei* possessor from restoring the same; saying that the laws simply distinguish between fructus *extantes* and *consumti*. It is true that fr. 28. and fr. 4. citt. (note *c.*) seem to intimate that the *bonæ fidei possessor* need not prescribe the fruits. Yet it is evident that these passages are intended only to say that he may acquire the property by means of mere separation, and Dr. R. has overlooked the fact that this property is revocable in its nature, and that the possessor therefore is not relieved from restoring the fruits, unless he either has consumed them, or acquired them by prescription. Comp. *Höpfner's* Comm. Ed. by A. D. Weber. 8th Ed. § 332.

(*f*) § 35. J. 2. 1.—fr. 4. § 19. D. 41. 3. (quoted above, p. 295. note *d.*)—const. 22. C. 3. 32. (quoted above, note *c.*)

TITLE THIRD.

RIGHTS OF THE PROPRIETOR.

I. In General.

§ 285. Property is in its nature an unrestricted and exclusive right (§ 260).

A. By virtue of its *unrestrictedness*, the owner of a thing is entitled to dispose at will of the substance of the same, and even to destroy it. Moreover, he can transfer to another his property in it either wholly or in part, or single rights contained in the property, both *inter vivos* and *mortis causa*. He has the right to possess the thing, to enjoy it, to reap every kind of fruit from it, and to make every unforbidden use of it he chooses, even though another should suffer injury in consequence.[a]

B. By virtue of the *exclusiveness* of his right, he is entiled to prevent every other person from using and enjoying the thing, even though he himself should receive no injury therefrom.[b] He has also the right of self-defence, and is entitled even to destroy the things of others, when he has reason to fear that they will cause the loss of his own, or endanger his use of the same.[c] The presumption, therefore,

(*a*) According to the general principle: "Qui jure suo utitur neminem lædit." — fr. 151. 155. § 1. D. 50. 17.—fr. 24. § 12. D. 39. 2.—fr. 9. D. 8. 2. (Ulpianus) "Cum eo, qui tollendo obscurat vicini ædes, *quibus non serviat*, nulla competit actio."—*Thibaut*, System. 7th Ed. § 560.

(*b*) fr. 16. D. 8. 3. (Callistratus) "Divus Pius aucupibus ita rescripsit: 'Οὐκ ἔστιν εὔλογον, ἀκόντων τῶν δεσποτῶν ὑμᾶς ἐν ἀλλοτρίοις χωρίοις ἰξεύειν.' (Non est consentaneum, ut per aliena prædia invitis dominis aucupium faciatis.)—fr. 13. § 7. D. 47. 10. (Ulpianus) "Si quis me prohibeat in mari piscari, vel everriculum, quod Græce σαγήνη dicitur, ducere, an injuriarum judicio possim eum convenire? Sunt qui putent, injuriarum me posse agere, et ita Pomponius; et plerique, esse huic similem eum, qui in publicum lavare, vel in cavea publica sedere, vel in quo alio loco agere, sedere, conversari non patiatur, aut si quis re mea uti me non permittat; nam et hic injuriarum conveniri potest. Conductori autem veteres interdictum dederunt, si forte publice hoc conduxerit; nam vis ei prohibenda est, quominus conductione sua fruatur. Si quem tamen ante ædes meas, vel ante prætorium meum piscari prohibeam, quid dicendum est? me injuriarum judicio teneri, an non? Et quidem mare commune omnium est, et litora, sicut aër: et est sæpissime rescriptum, non posse quem piscari prohiberi, sed nec aucupari, *nisi quod ingredi quis agrum alienum prohiberi potest*. Usurpatum tamen et hoc est, tametsi nullo jure, ut quis prohiberi possit ante ædes meas vel prætorium meum piscari; quare si quis prohibeatur, adhuc injuriarum agi potest. *In lacu tamen, qui mei dominii est, utique piscari aliquem prohibere possum*."—const. 11. C. 3. 34. "*Per agrum quidem alienum, qui servitutem non debet, ire vel agere vicino minime licet*. Uti autem via publica nemo recte prohibetur."—const. 11. 14. C. 4. 38.

(*c*) fr. 1. D. 14. 2. (Paulus) "Lege Rhodia cavetur, ut, si levandæ navis gratia jactus mercium factus sit, omnium contributione sarciatur, quod pro omnibus datum est."—fr. 3. § 7. D. 47. 9. (Ulpianus) "Quod ait Prætor de damno dato, ita demum locum habet, si dolo malo damnum datum sit; nam si dolus malus absit, cessat edictum. Quemadmodum ergo procedit, quod Labeo scribit: si defendendi mei causa vicini ædificium orto incendio dissipaverim, et meo nomine et familiæ, judicium in me dandum? Quum enim defendendarum mearum ædium causa fecerim, utique dolo careo; puto igitur non esse verum, quod Labeo scribit. An tamen lege Aquilia agi cum hoc possit? Et non puto agendum; nec enim injuria hoc fecit, qui se tueri voluit, quum alias non posset; et ita Celsus scribit."—fr. 7. § 4. D. 43. 24. (Idem) "Est et alia exceptio de qua Celsus dubitat, an sit objicienda, utputa si incendii arcendi causa vicini ædes intercidi, et quod vi aut clam mecum agatur, aut damni

is always in favour of this unrestrictedness and exclusiveness or freedom of property. Property, however, may be limited in either of these respects (§ 260), and the ground of such restraint may lie either in the will of the proprietor himself or in a provision of law.

II. Legal Restrictions of Property.[a]

286. To the *legal* restrictions of property belong—in addition to the prohibitions of alienation, servitudes, and liens imposed by the law[b]—especially the following: 1. The proprietor must not directly endanger his neighbour's building by digging too deep on his own land.[c] 2. In putting up a new building, he must keep at a certain distance from his neighbour's boundary.[d] 3. He must erect no building on his own land whereby his neighbour's threshing-floor would be

injuria. Gallus enim dubitat an excipi oporteat, quod incendii defendendi causa factum sit? Servius autem ait: si id magistratus fecisset, dandam esse; privato non esse idem concedendum; si tamen quid vi aut clam factum sit, neque ignis usque eo pervenisset, simpli litem æstimandam; *si pervenisset, absolvi eum oportere.* Idem, ait, esse, si damni injuria actum foret, *quoniam nullam injuriam aut damnum dare videretur, æque perituris ædibus.* Quodsi nullo incendio id feceris, deinde postea incendium ortum fuerit, non idem erit dicendum, quia non ex post facto, sed ex presente statu damnum factum sit necne, æstimari oportere, Labeo ait."—*Kritz*, Abhandl. über Materien des Civilr. Leipsic, 1824. p. 79–100.—Contra: *Thibaut* in the Archiv Civ. Prax. Vol. 8. p. 139.

(*a*) See in general, *Schweppe's* Röm. Privatrecht. Vol. 2. § 227–233. 259.

(*b*) See § 185, § 291. 5., and Book I. chap. 6.

(*c*) fr. 24. § 12. in fin. D. 39. 2. On some excepted cases, in which a special permission is required for erecting buildings, see fr. 3. pr. D. 50. 10.—*Gesterding*, Nachforschungen. Vol. 3. p. 391.

(*d*) fr. 13. D. 10. 1. (Gaius) "Sciendum est, in actione finiam regundorum illud observandum esse, quod ad exemplum quodammodo ejus legis scriptum est, quam Athenis Solonem dicitur tulisse. Nam illic ita est: *Ἐάν τις αἰμασίαν παρ' ἀλλοτρίῳ χωρίῳ ὀρυγῇ, τὸν ὅρον μὴ παραβαίνειν· ἐὰν τειχίον, πόδα ἀπολείπειν· ἐὰν δὲ οἴκημα, δύο πόδας· ἐὰν δὲ τάφον ἢ βόθρον ὀρύττῃ, ὅσον τὸ βάθος ᾖ, τοσοῦτον ἀπολείπειν· ἐὰν δὲ φρέαρ ὀργυιάν· ἐλαίαν δέ, καὶ συκῆν ἐννέα πόδας ἀπὸ τοῦ ἀλλοτρίου φυτεύειν· τὰ δὲ ἄλλα δένδρα πέντε πόδας.* (Si quis sepem ad alienum prædium fixerit infoderitque, *terminum ne excedito*; si maceriam, *pedem relinquito*; si vero domum, *pedes duos.* Si sepulchrum aut scrobem foderit, *quantum profunditatis habuerint, tantum spatii relinquito*; si puteum, *passus latitudinem.* At vero oleam aut ficum *ab alieno ad novem pedes plantato*, ceteras arbores *ad pedes quinque.*)"—fr. 14. D. 8. 2. (Papirius Justus) Imperatores Antoninus et Verus Augusti rescripserunt: in area, quæ nulli servitutem deberet, posse dominum, vel alium voluntate ejus ædificare, *intermisso legitimo spatio a vicina insula.*" — const. 12. § 2. C. 8. 10. "Quia vero nostra constitutio dicit, eum, qui ædificaturus est inter suam et vicini domum, duodecim pedum interstitium relinquere oportere, et plus minusve addit, quod quidem maximam securitatem præstat (dubia enim ad tollendam ambiguitatem non sunt idonea), perspicue jubemus, inter utramque domum duodecim pedum intercapedinem esse, quæ ab ædificio fundamentis imposito incipiat, atque usque ad summam altitudinem conservetur; ceterum qui hoc observat, *ei* licere in quamcunque velit altitudinem domum tollere, et fenestras prospectivas, ut vocantur, et luciferas facere secundum sacram legislationem, sive novam domum ædificare velit, sive veterem instaurare, sive igne consumtam reficere; nec tamen ex hoc intervallo contrahi vicini prospectu in mare recto neque impedito, quem vicinus in propria domo stans vel etiam sedens habet, nec dum cogit eum, ut ex transverso adspiciat, et ut mare videat se torqueat. De hortis enim et arboribus nec in priore legislatione tractatum est, nec quidquam præsenti addetur; neque enim convenit."—const. 9. 11. C. 8. 10. It is more especially necessary with respect to a *sterculinium* or *latrina.* fr. 17. § 2. D. 8. 5. (Alfenus) "Secundum cujus parietem vicinus sterculinium fecerat, ex quo paries madescebat; consulebatur, quemadmodum posset vicinum cogere, ut sterculinium tolleret? Respondi: si in loco publico id fecisset, *per interdictum cogi posse*, sed si in privato, *de servitute agere oportere*; sed si damni infecti stipulatus esset, *posse per eam stipulationem*, si quid ex ea re sibi damni datum esset servare."—fr. 3. D. 39. 3.—*Gesterding*, Nachforschungen. Vol. 3. p. 398.

deprived of the necessary draught of air.[a] 4. The piece of ground which is lowest must receive the rain-water that runs off the higher one, and the proprietor must not hinder the natural flowing off of the water by any obstructions. On the other hand, the proprietor of the higher piece of ground must not lead the water on to the lower one, by artificial contrivances, either in a large mass or in a new direction; otherwise the *actio aquæ pluviæ arcendæ* will lie against him.[b] 5. With

(*a*) const. 14. § 1. C. 3. 34. "Quum autem apertissimi juris est, fructus aridos conculcatione, quæ in area fit, suam naturam et utilitatem ostendere, aliquis vicinum suum vetabat ita ædificium extollere juxta aream suam, ut ventus excluderetur et paleæ ex hujusmodi obstaculo secerni a frugibus non possent, quasi vetito vento suam vim per omnem locum inferre ex hujusmodi ædificatione, quam secundum situm regionis et auxilium venti aream accedit. Sancimus itaque, nemini licere sic ædificare vel alio modo versari, ut idoneum ventum et sufficientem ad præfatum opus infringat, et inutilem domino aream et fructuum inutilitatem faciat." The same must be said of a windmill, in case the new building would entirely keep the wind from the mill. Another opinion is advanced by *Bülow* and *Hagemann*, Pract. Erörterungen. Vol. 4. No. 2.

(*b*) fr. 1. § 1. 2. D. 39. 3. (Ulpianus) "Hæc autem actio (scil. aquæ pluviæ arcendæ) locum habet in damno nondum facto, opere tamen jam facto, hoc est *de eo opere, ex quo damnum timetur*, totiesque locum habet, quoties manu facto opere agro aqua nocitura est, *id est, cum quis manu fecit, quo aliter flueret, quam natura soleret*, si forte immittendo eam aut majorem fecerit, aut citatiorem, aut vehementiorem, aut si comprimendo redundare effecit. *Quodsi natura aqua noceat, ea actione non continetur.* § 2. Neratius scribit: *Opus, quod quis fecit, ut aquam excluderet, quæ exundante palude in agrum ejus refluere solebat, si ea palus aqua pluvia ampliatur, eaque aqua repulsa eo opere agris vicini noceat, aquæ pluviæ actione cogetur tollere.*—fr. 1. § 18. D. ibid. Nec illud quæramus: unde oriatur? nam et si publico oriens vel ex loco sacro per fundum vicini descendat, *isque opere facto in meum fundum eam avertat, aquæ pluviæ arcendæ teneri eum*, Labeo ait.—fr. 1. § 22. D. ibid. Sed si vicinus opus tollat et sublato eo *aqua naturaliter ad inferiorem agrum perveniens noceat*, Labeo existimat aquæ pluviæ arcendæ agi non posse; semper enim hanc esse servitutem inferiorum prædiorum, ut natura profluentem aquam excipiant. *Plane si propter id opus sublatum vehementior aqua profluat vel corrivetur, aquæ pluviæ arcendæ actione agi posse*, etiam Labeo confitetur. § 23. Denique ait: conditionibus agrorum quasdam leges esse dictas, ut, in quibus agris magna sint flumina, liceat mihi scilicet in agro tuo aggeres vel fossas habere; si tamen lex non sit agro dicta, agri naturam esse servandam, *et semper inferiorem superiori servire, atque hoc incommodum naturaliter pati inferiorem agrum a superiore*, compensareque debere cum alio commodo; sicut enim omnis pinguitudo terræ ad eum decurrat, ita etiam aquæ incommodum ad eum defluere; si tamen lex agri non inveniatur, *vetustatem vicem legis* tenere. Sane enim et in servitutibus hoc idem sequimur, ut, ubi servitus non invenitur imposita, qui diu usus est servitute neque vi, neque precario, neque clam, habuisse longa consuetudine velut jure impositam servitutem videatur. Non ergo cogemus vicinum aggeres munire, sed nos in ejus agro muniemus, critque ista quasi servitus. In quam rem utilem actionem habemus vel interdictum."—*Schneider* in the Z. f. Civil. R. u. Proc. Vol. 5. p. 325. —The same principle applies to public rivers; hence nobody is entitled to erect any thing in or over a public river, not even on his own ground, whereby the course of the river would be altered so as to injure a neighbour and impede him in his former use of the water. fr. 1. § 2–7. D. 43. 13.—fr. 1. § 1. D. 43. 13. (Ulpianus) "Hoc interdicto *prospexit Prætor, ne derivationibus minus concessis flumina exarescant, vel mutatus alveus vicinis injuriam aliquam afferat.*"—fr. 3. § 1. D. 43. 20. (Pomponius) "Ex flumine aquam ducere plures possunt, *ita tamen, ut vicinis non noceant*, vel si angustus amnis sit, etiam ei, qui in alia ripa sit."—fr. 1. § 11. D. 43. 21.—fr. 1. § 4. in fin. D. 39. 3. (Ulpianus) "Sed et fossas agrorum siccandorum causa factas, Mucius ait, fundi colendi causa fieri, non tamen oportere derivandæ aquæ causa fieri; sic enim debere quem meliorem agrum suum facere, *ne vicini deteriorem faciat.*"—fr. 17. D. 8. 3. (Papirius Justus) "Imperatores Antoninus et Verus Augusti rescripserunt: aquam de flumine publico pro modo possessionum ad irrigandos agros dividi oportere, nisi proprio quis jure plus sibi datum ostenderit. Item reseripserunt: aquam ita demum permitti duci, *si sine injuria alterius id fiat.*"—const. 2. C. 3. 35. "Legis Aquiliæ actione expertus adversus eum, quem domum tuam deposuisse vel incendio concremasse, damnoque te affixisse proponis, ut id damnum sarciatur, competentis judicis auctoritate consequeris. Quin *etiam si aqua per injuriam alio derivata sit, ut in priorem statum restituatur*, ejusdem judicis cura impetrabis."—const. 4. C. 3. 34. "*Aquam*, quæ in alieno loco oritur, *sine voluntate ejus*, ad quem usus ejusdem aquæ pertinet, *prætoris edictum non permittit ducere.*"—const. 7. C. ibid. "Si manifeste do-

respect to trees and other plantations, the Roman law ordains that they must always be placed at some distance from a neighbour's boundary. If the roots grow into the neighbour's soil and become injurious to his building, they must be chopped off as far as necessary.[a] If the branches of a tree stretch out over a neighbour's building and become injurious to it, the neighbour may require the proprietor of the tree to cut it down altogether: if the latter neglects, he may do it himself, in which case he keeps the wood; and should he be hindered in so doing, he has a right to the *interdictum de arboribus cædendis*. But if the tree merely extends over the neighbour's land, he can only require that the branches be cut off as high as fifteen feet from the ground (*sublucatio arborum*); and when the proprietor neglects it, he may do it himself, and keep the wood; in this case also he has the *interdictum de arboribus cædendis*.[b] 6. The proprietor of land on which fruit falls from a neighbour's trees must permit him "*tertio quoque die*," i. e. every third day, or, which is the same thing, every other day, but not oftener, to gather up the fruit; and in case this is refused, the neighbour has the *interdictum de glande legenda*.[c]

III. Rights of Joint-Owners.

§ 287. If a thing is owned by several conjointly (§ 261), then, according to rule, 1. Each of the joint-owners has a share in the fruits proportionate to his share of the property; and each one can make

ceri possit, jus aquæ ex vetere more atque observatione per certa loca profluentis utilitatem certis fundis irrigandi causa exhibere, procurator noster, *ne quid contra veterem formam atque solennem morem innovetur, providebit*."—But it is not so with private brooks and rivulets. *Gesterding*, Nachforschungen. Vol. 3. p. 349. Concerning the law on water rights both *jure dominii* and *jure servilutis*, see: C. G. Biener, Interpret. et respons. Leipsic, 1825. cap. 24. and in his Opusc. Edited by F. A. Biener. Vol. 2. No. 102.—*Günther* de jure Aquarum. Spec. 1–4. Leipsic, 1829. Spec. 5. 1830.—*Funcke* in the Archiv Civ. Prax. Vol. 12. p. 274. 432.—*H. E. Hofmann*, Versuche. No 2. p. 1–70.—*Weiske*, Quæst. jur. civ. Zwickau, 1831. p. 49.—*Elvers*, Neue Themis. Vol. 1. No. 3.

(*a*) fr. 13. D. 10. 1.—fr. 6. § 2. D. 47. 7. (Pomponius) "Si arbor in vicini fundum radices porrexit, recidere eas vicino non licebit; *agere autem licebit, non esse ei jus* sicuti tignum aut protectum immissum habere. Si radicibus vicini arbor aletur, tamen ejus est, in cujus fundo origo ejus fuerit."—const. 1. C. 8. 1. "Quum proponas, radicibus arborum, in vicina Agathangeli area positis, crescentibus fundamentis domus tuæ periculum afferi, Præses ad exemplum interdictorum, quæ in albo proposita habet prætor: *Si arbor in alienas ades impendebit*; item: *Si arbor in alienum agrum impendebit*, quibus ostenditur, nec per arboris quidem occasionem vicino nocere oportere, rem ad *suam* æquitatem rediget."

(*b*) Dig. 43. 27.—*Pauli* sent. rec. V. 6. 13.—*Andreæ*, Diss. ad tit. Dig. de arboribus cædendis. Jena, 1818.—*Dirksen* in the Z. f. gesch. R. W. Vol. 2. No. 16.—*Thibaut*, Civ. Abh. p. 1. Note 2. and *Braun* zu Thibaut, § 582. Opinions respecting this interdict disagree. Many jurists hold that the owner of the tree is bound to cut off all the branches which extend over the neighbour's ground and to lop off all the rest above the height of 15 feet from the ground, so as to leave the branches remaining only on the lower part of the tree (*ita ut quindecim pedes altius a terra rami arboris circumcidantur*). See especially: *Hugo*, R. G. p. 204.—*Kirsten* de coërcitione arborum in fundum vicinalem propendentium. Gottingen, 1820. — *J. J. Lang* ad L. 1. § 7–9. D. de arboribus cædendis (43. 27.). Heidelberg, 1823.—*Eichstedt*, Spicilegium observationum ad tit. Dig. de arboribus cædendis. Jena, 1825.—*Lauzeau* and *Kori*, Erört. Vol. 2. No. 23.—*Guyet* in the Archiv Civ. Prax. Vol. 17. p. 31.

(*c*) D. 43. 28.—*Schweppe*, Jur. Mag. No. 1. p. 142.—*Schweppe*, Röm. Priv. R. Vol. 2. § 259.—*Thibaut*, Civ. Abh. No. 1. and in the Archiv Civ. Prax. Vol. 1. p. 116.—*Rosshirt* in his Z. f. Civ. u. Crim. R. No. 1. p. 117.—Some writers understand '*tertio quoque die*' in

for himself that use of the thing for which it is designed. 2. But, on the other hand, none of the joint-owners, without the consent of all the rest, can dispose either of the whole thing or of a particular corporeal part thereof;[a] unless such disposal be necessary to preserve the thing from ruin or danger,[b] or be in no way prejudicial to any of the others.[c] 3. Each of the joint-owners is at liberty to alienate his imaginary share in the thing in any manner and to whomsoever he pleases,[d] and also to require at any time the actual division of the thing itself. The action allowed for this purpose is the *actio communi dividundo*.[e]

IV. Actions.

A. Rei Vindicatio.

a. Parties and Object.

§ 288. The proprietor is entitled to enforce his right of property in a thing against every one who withholds it from him. The action granted him for this purpose is called *rei vindicatio*.[f] 1. This action

the sense that the neighbour is to be allowed to pick up the fruits only every third day, leaving two days between. *Jac. Grimm* in the Z. f. gesch. R. W. Vol. 3. p. 351. and in the Tüb. krit. Z. Vol. 4. p. 171. *Guyet* in the Archiv Civ. Prax. Vol. 17. p. 64.—Contra: *Gaupp* in the Tüb. krit. Z. Vol. 3. p. 255. Vol. 4. p. 501. *G. F. Puchta* in Schunck's Jahrb. Vol. 9. p. 21.

(*a*) fr. 28. D. 10. 3. (Papinianus) "Sabinus ait: '*In re communi neminem dominorum jure facere quidquam invito altero posse.*' Unde manifestum est, prohibendi jus esse; *in re enim pari potiorem causam esse prohibentis constat.* Sed etsi in communi prohiberi socius a socio, ne quid faciat, potest, ut tamen factum opus tollat, cogi non potest, si, quum prohibere poterat, hoc prætermisit, et ideo per communi dividundo actionem damnum sarciri poterit. Sin autem facienti consensit, nec pro damno habet actionem. Quodsi quid absente socio ad læsionem ejus fecit, tunc etiam tollere cogitur." Hence a majority of votes does not decide.—const. 1. 4. C. 4. 52.—*Struben*, Rechtliche Bedenken. Vol. 5. No. 30.—*Gesterding*, Eigenthum. § 9.

(*b*) fr. 52. § 10. D. 17. 2.—const. 4. C. 8. 10.

(*c*) For instance: fr. 13. § 1. D. 8. 2. (Proculus) "*Parietem communem incrustare licet* secundum Capitonis sententiam, sicut *licet pretiosissimas picturas habere in pariete communi*; ceterum si demolitus sit vicinus, et ex stipulatu actione damni infecti agatur, non pluris, quam vulgaria tectoria, æstimari debent. Quod observari et in incrustatione oportet."

(*d*) const. 3. C. 4. 52. "*Falso tibi persuasum est, communis prædii portionem pro indiviso*, antequam communi dividundo judicium dictetur, tantum socio, *non etiam extraneo posse distrahi*."—fr. 68. pr. D. 17. 2. (Gaius) "Nemo ex sociis plus parte sua potest alienare, etsi totorum bonorum socii sint."—fr. 28. D. 10. 3. (quoted above, note *a*.)

(*e*) Dig. 10. 3.—Cod. 3. 37.—3. 38.—§ 3. J. 3. 28. (27.)—*Weichsel*, Ueber gemeinschaftliches Eigenthum, Gemeinheiten und Servituten. Magdeburg, 1824. § 41–48.

(*f*) § 1. J. 4. 6.—Dig. 6. 1.—Cod. 3. 32. Cod. 3. 19.—*Donelli* Comm. jur. civ. Lib. 20. c. 1–7.—*Glück*, Comm. Vol. 8. § 576–592.—*Gesterding*, Eigenthum. § 41–50.—*Du Roi* in the Archiv Civ. Prax. Vol. 6. p. 252. 386. (Contra: *Puchta* in the Rhein. Mus. Vol. 1. p. 286.)—*Schweppe*, Röm. Priv. R. Vol. 2. § 267–275 *a*.—*Kritz*, Darstellung Praktischer Materien des Röm. Rechts. Vol. 1. Dresden and Leipsic, 1831.—*Buchholtz*, Jur. Abh. No. 1.—*Puchta*, Klagen. § 69–74. The Roman distinction between *vindicatio directa* and *utilis* was not, as Dr. Rosshirt supposes it to be, of any practical importance in the later Roman law, nor is it at the present day. Comp. *Savigny*, System. Vol. 5. p. 11 seqq. p. 70 seqq. This distinction is by no means peculiar to the doctrine of property, for it runs through the whole of the Roman system of actions. *Directæ actiones* were those specially established by a law, while *actiones utiles* were such as were introduced from considerations of equity, or which were allowed by way of analogy to the legal actions. See above, § 194. and comp. *Thibaut*, System 7th Ed. § 70. 8th Ed. § 72.—Dr. R. also errs when he says that the following theory of modern teachers of practice is incorrect, viz. that a *vindicatio* cannot be brought without the plaintiff's alleging the title under which he holds the property claimed by him. It is true that the Roman and canon laws permit the plaintiff to bring an

belongs only to the true proprietor of the thing.* It is therefore requisite in order to maintain it, that the plaintiff furnish proof of his ownership. Consequently, if he alleges that he has acquired the thing by way of transfer, he must prove that he from whom he received it was proprietor of the same (§ 274).[b] Moreover, the true proprietor is entitled to avail himself of this action only when he is not in possession of the thing.[c]* 2. The defendant here, is he who possesses the thing

action for the recovery of property, in which he simply alleges his right of ownership, without stating by what title he acquired the same, until the stage of evidence. This however has been altered by the imperial laws of Germany, which have made it the duty of the defendant to give direct and specific answers respecting all the facts on which the action is founded. In accordance with this, the practice in Germany has always required the plaintiff to specify all those facts on which he relies as the ground of his action, and this course is certainly correct; for were the plaintiff allowed to assert his claim in such general terms, it would be impossible or at least exceedingly difficult for the defendant to defend himself as fully as he is entitled to do. Hence it has been adopted as a general rule for ordinary proceedings, that all the facts of which the plaintiff and defendant wish to avail themselves in the case, must be set forth before the stage of evidence, in order to determine what are the points in dispute that need to be proved. According to the judicial usage of Germany, the court will therefore reject any action which is brought without stating expressly the mode in which the plaintiff acquired the rights which he seeks to enforce. The rejection is made either *ex officio*, or upon the defendant's interposing the *exceptio generalitatis* or *obscuritatis libelli*, which discharges him from the necessity of answering the libel.

(*a*) fr. 23. pr. D. 6. 1. (Paulus) "In rem actio competit ei, qui aut jure gentium, aut jure civili *dominium acquisivit*."—It is immaterial whether he has the *dominium plenum* or the *mera proprietas*. fr. 33. pr. D. ibid.

(*b*) In accordance with fr. 20. pr. D. 41. 1. (Ulpianus) "Traditio nihil amplius transferre debet vel potest ad eum, qui accepit, quam est apud eum, qui tradit. Si igitur quis dominium in fundo habuit, id tradendo transfert; *si non habuit, ad eum qui accipit, nihil transfert.* § 1. *Quoties autem dominium transfertur, ad eum, qui accipit, tale transfertur, quale fuit apud eum, qui tradit*; si servus fuit fundus, cum servitutibus transit; si liber, uti fuit; et si forte servitutes debebantur fundo, qui traditus est, cum jure servitutum debitarum transfertur. Si quis igitur fundum dixerit liberum, quum traderet eum, qui servus sit, nihil juris servituti fundi detrahit, verumtamen obligat se, debebitque præstare, quod dixit."—fr. 54. D. 50. 17. (quoted above, p. 174. note *b.*)—*Donelli* Comm. jur. civ. Lib. 20. c. 2.—*Glück*, Comm. Vol. 8. § 585.—*Krazer*, Ueber den Beweis des Eigenthums. Vienna, 1810. p. 8.—*Gesterding*, Eigenthum. pp. 261 and 362.—*Seuffert*, Erört. Divis. II. p. 32.—Contra: *Schöman*, Handb. des Civ. R. Vol. 2. p. 47.—*Thibaut* in the Archiv Civ. Prax. Vol. 6. p. 311. and *Kritz*, l. c. p. 76 seqq.—On the other hand the common opinion is again defended by *Unterholzner* in the Archiv Civ. Prax. Vol. 7. p. 233.—*Henschel*, ibid. Vol. 9. p. 316.—*Heimback* de dominii probatione ex principiis juris tam Romani quam Saxonici. Lcipsic, 1827.—*Bethmann-Hollweg*, Versuche über einzelne Theile des Civilprocesses. p. 360.—*Falkenstein* in the Archiv Civ. Prax. Vol. 10. p. 226.—*Gesterding*, Nachforschungen. Vol. 2. p. 435.—Comp. also *Unterholzner* in the Tüb. krit. Z. Vol. 3. p. 463 seqq. *Thibaut* himself in the 7th Edition of his System, § 566, adopts the common opinion.—Respecting the proof of joint-ownership see, *Arndts* in the Rhein. Mus. Vol. 3. p. 215.—When the plaintiff (as Dr. Rosshirt adds) has furnished proof of the fact that he has acquired the ownership, and the defendant interposes the *exceptio dominii* (the so-called *contra-vindicatio*), viz. the plea that the plaintiff no longer held the ownership at the time when the action was instituted, but that he had lost it; then it is incumbent upon the defendant to prove his assertion that the plaintiff's right of property had terminated.

(*c*) § 2. J. 4. 6. "Æque si agat, jus sibi

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* Real actions may be brought against every third possessor. As a general rule, they presuppose that the plaintiff is not himself in possession of the object sued for. It is only in a few *actiones in rem*, especially in actions relating to servitudes (*actio negatoria* and *confessoria*), that the entitled party can institute an action in order to protect himself against a disparagement of his rights, even though he be in possession; while with respect to property actions, the rule holds good that the plaintiff is supposed not to be in possession, but to claim his property from the defendant as possessor. The Institutes state however (§ 2. J. 4. 6. quoted in note *c.*) that there is a

and disputes the property with the plaintiff, or, if not actually in possession, he whom the law regards as the possessor (*fictus possessor*).[a] If the defendant falsely deny that he possesses the thing and be convicted thereof, he must, as a punishment, surrender the possession to the plaintiff.[b] He who holds possession only in the name of another, when this action is brought against him, must tell the name of the true possessor, in order that the plaintiff may institute his action against the

esse fundo forte vel ædibus utendi fruendi, vel per fundum vicini eundi agendi, vel ex fundo vicini aquam ducendi, in rem actio est. Ejusdem generis est actio de jure prædiorum urbanorum, veluti si agat, jus sibi esse altius ædes suas tollendi, prospiciendive, vel projiciendi aliquid, vel immittendi tignum in vicini ædes. Contra quoque de usufructu, et de servitutibus prædiorum rusticorum, item prædiorum urbanorum, invicem quoque proditæ sunt actiones; ut si quis intendat, jus non esse adversario utendi fruendi, eundi agendi, aquamve ducendi, item altius tollendi, prospiciendi, projiciendi, immittendi, istæ quoque actiones in rem sunt, sed negativæ. Quod genus actionis in controversiis rerum corporalium proditum non est. *Nam in his is agit, qui non possidet*, ei vero qui possidet, non est actio prodita, per quam neget, rem actoris esse. *Sane uno casu* qui possidet nihilominus actoris partes obtinet, sicut in latioribus Digestorum libris opportunius apparebit." — *Theophilus* observes on the foregoing passage: "In corporalibus *is solus agit in rem, qui non possidet*, possidenti enim actio in rem non datur, neque dicere possum: 'Si apparet, agrum illius non esse.' In uno autem solo casu possessor actionem in rem movere potest, qui et possidet, et actoris locum obtinet, sicut in latioribus Digestorum libris commode apparebit."—See also fr. 12. § 1. D. 41. 2.—*Cujacii* Observ. 7. 39. *Sammet*, Hermeneutik. p. 153.—*M. Saulling* de interpretatione verborum in fin. § 2. J. de actionibus (4. 6.), "Sane uno casu," etc. Wurtzburg, 1788.—*Glück*, Comm. Vol. 8. p. 138.—*Savigny*, Besitz. p. 88. 380. 423.

(*a*) fr. 9. D. 6. 1. (quoted above, p. 240. note *b*.) comp. fr. 27. pr. § 3. fr. 52. D. 6. 1.—fr. 131. and fr. 157. § 1. D. 50. 17. (quoted above, p. 247. note *a*.)—§ 1. J. 4. 6.

(*b*) fr. 80. D. 6. 1.

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single case where the proprietor may bring a property action even though he possesses the thing himself; but instead of denoting particularly what case is meant, they merely refer in general terms to the Pandects. Yet there is no passage to be found in the Pandects which has special reference to this in the Institutes. The opinions with respect to the case which Justinian may have had in view, are consequently very diverse; and the dispute remains unsettled to this day. Many civilians suppose that by "*uno casu*" was meant the *actio negatoria*; since this is only a kind of *rei vindicatio*, and may be brought by the proprietor, even when he himself is in possession of the thing, against every one who unjustly impairs his rights of ownership by assuming to himself a right of servitude. fr. 17. pr. D. 8. 5.—fr. 2. D. 43. 27.—fr. 6. § 2. D. 47. 7.—Comp., among the older supporters of this view, *Huber*, Prælectiones secundum Institutiones et Digesta. Leipsic, 1735. Vol. 1. p. 393 seqq.; see also *Höpfner*, Comm. 8th Ed. § 1095. Other jurists with less reason suppose that the case intended is that of the *confessoria actio*, as that may actually be instituted by a possessor of a right of servitude. fr. 5. § ult. D. 7. 6.—fr. 6. § 1. D. 8. 5. It is however much more probable, that Justinian had reference to neither of the servitude actions, but rather to the property action itself. This view, which is supported among others by Thibaut (*Braun*, Erörterungen, p. 75 seqq.), has respect to the case in which, while the proprietor has obtained possession of the principal thing, the accessory things are still either wholly or in part withheld from him. Now it is a well known principle of Roman law, that there is no separate action for accessory things; since these must be claimed at the same time and by the same action with the principal thing. This principle however would evidently be unreasonable when applied to the case where the proprietor has no need to sue for the principal thing which he already possesses, but only seeks to recover the accessory things belonging to it. In order therefore to provide for the proprietor in such case a remedy whereby he might obtain the *accessorium*, a very reasonable feeling of equity suggested the fiction of considering him as one who had not yet received the principal thing, and thus allowing him to bring the property action. fr. 5. pr. D. 19. 1.—fr. 66. § 6. D. 31.—fr. 20. fr. 27. D. 46. 3.

latter. This is called *nominatio auctoris s. laudatio domini.* If the defendant omit to do this, he himself becomes responsible as a *fictus possessor qui liti se obtulit.*[a]

The object of the action may be either a single thing or a *universitas rerum*, consisting of corporeal things of the same kind; but not an entire estate as such, as e. g. a peculium or inheritance.[b*]

b. Its aim.

§ 289. 1. The aim of the *rei vindicatio* is that the plaintiff be declared proprietor of the thing, and that the defendant be accordingly sentenced to surrender it to him[c] with all its appurtenances (*cum omni*

(*a*) const. 2. C. 3. 19. compared with fr. 25. fr. 27. pr. D. 6. 1.—*Linde*, Abh. aus dem Civil-Process. p. 125.—*Gensler* in the Archiv Civ. Prax. Vol. 3. No. 25.

(*b*) fr. 1. pr. D. 6. 1. (Ulpianus) "Post actiones, quæ de *universitate* propositæ sunt, *subjicitur* actio *singularum rerum* petitionis."—fr. 1. § 3. D. ibid. (Idem) "Per hanc autem actionem non solum singulæ res vindicabuntur, *sed posse etiam gregem vindicari*, Pomponius libro Variarum Lectionum vicesimo quinto scribit. Idem et de armento, et de equitio, ceterisque, quæ gregatim habentur, dicendum est. Sed enim gregem sufficiet ipsum nostrum esse, licet singula capita nostra non sint; grex enim, non singula corpora vindicabuntur."—fr. 2. D. ibid. (Paulus) "Sed si par numerus duorum interfuerit, neuter solidum *gregem*, sed nec partem dimidiam totius ejus vindicabit. Sed si majorem numerum alter habeat, ut detracto alieno nihilominus *gregem vindicaturus sit*, in restitutionem non veniunt aliena capita."—fr. 3. pr. D. ibid. (Ulpianus) "Marcellus libro quarto Digestorum scribit: *Qui gregem habebat capitum trecentorum, amissis centum redemit totidem capita aliena ab eo, qui dominium eorum habebat, vel qui bona fide ea possidebat, et hæc utique gregis*, inquit, *vindicatione continebuntur*. Sed et si ea solo supersint capita quæ redemta sunt, adhuc eum posse gregem vindicare. § 1. Armamenta navis singula erunt vindicanda; scapha quoque separatim vindicabitur."—fr. 56. D. ibid. (Julianus) "Vindicatio non ut gregis, ita et peculii recepta est, sed res singulas is, cui legatum peculium est, petet."—See respecting these passages *Elvers'* Jur. Zeit. for 1830. p. 39.—Documents also, e. g. a testament or a deed, may be the object of a *rei vindicatio*. —fr. 3. D. 29. 3. (Gaius) "Ipsi tamen heredi vindicatio tabularum, sicut ceterarum hereditariarum rerum competit, et ob id ad exhibendum quoque agere potest." — Comp. *Geiger* and *Glück*, Merkwürdige Rechtsfälle. Vol. 3. No. 33.—*Gönner* in his Archiv für Gesetzgebung. Vol. 1. No. 27.—*Bülow*, Abh. Vol. 1. No. 17. Vol. 2. No. 30.—*Kind*, Quæstiones forenses. 1st Ed. Vol. 1. chap. 96. 2d Ed. Vol. 3. chap. 26.—*Gönner*, Ueber Staatspapiere. § 56.—*Souchay* in the Archiv Civ. Prax. Vol. 10. p. 143.

(*c*) When the thing sued for has ceased to exist or has been lost by accident, a *possessor malæ fidei* is responsible on account of his mora, in case the thing would not have suffered the accident, if the owner had had it in his possession, or in case he would have sold it before the occurrence of the accident. fr. 15. § 3. D. § 1.—fr. 40. pr. D. 5. 3. A *bonæ fidei pos-*

* Our Author says, in note *b*, that vindication applies generally to all documents which are evidences of debt. According to the Roman law this is correct; but in most countries of Germany certain kinds of bills are excepted, viz. such as are not made payable to a certain person, but to the bearer (*au porteur*), e. g. paper-money, bank-notes, certificates of stock, &c. According to the common law of Germany, the vindication of such evidences of debt is not absolutely excluded; but, on account of the difficulty of proving identity where there are no particular marks, it is not easy for the plaintiff to succeed. In consideration of the importance of promoting the free circulation of such paper-money, the legislatures of different German states have placed the vindication of it on the same footing with that of coin. Metallic money however, as its character requires, can be vindicated only so far as it exists *in natura*, and has not been mixed with the money of the defendant (§ 270). Accordingly the *surrogata* of money, when e. g. things are procured with money belonging to another, whether it has been improperly obtained or not (the money of pupils, minors, or churches excepted), cannot, as a general rule, be vindicated: because vindication applies only to the very object itself belonging to us, as it exists *in natura*.

causa).[a] As regards the fruits of the thing in particular, the possessor *malæ fidei* must deliver up all the fruits which he has reaped or might have reaped up to the time of litis-contestation; and from that time onward, he must make compensation also for such as the plaintiff could have reaped if he had had possession. The possessor *bonæ fidei*, on the contrary, has to deliver up only the fruits which he has actually reaped before the litis-contestation, and even these only so far as they have not been consumed by him (§ 284); but after the time of litis-contestation, he must either restore all the fruits that he has reaped or might have reaped, or must make compensation for them.[b]

2. The plaintiff, on the other hand, is obliged to satisfy certain claims of the defendant in return. Although according to rule he is not bound to refund to the defendant the price which the latter has paid to obtain the thing;[c] yet he is obliged to compensate the defendant for certain kinds of expenses which he incurred for the benefit of the thing, during his possession.[d] If those expenses are *impensæ neces-*

sessor is not responsible except on account of *locupletatio*, as e. g. when he has received the sum for which it was insured. Comp. *Kämmerer* in the Z. für Civ. R. u. Proc. Vol. 8. No. 1.

(*a*) fr. 17. § 1. fr. 20. D. 6. 1.—fr. 23. § 2. D. ibid. (Paulus) "Si quis rei suæ alienam rem ita adjecerit, ut pars ejus fieret, veluti si quis statuæ suæ brachium aut pedem alienum adjecerit, aut scypho ansam vel fundum, vel candelabro sigillum, aut mensæ pedem, dominum eum totius rei effici, vereque statuam suam dicturum, et scyphum, plerique recte dicunt." § 3. ibid. (quoted above, p. 282. note *b*.), § 4. ibid. (quoted above, p. 278. note *b*.)

(*b*) const. 22. C. 3. 32. (quoted above, § 284. note *c*.) The reason is, because the *possessor bonæ fidei* is regarded as a *malæ fidei possessor* from the time of the litis-contestation upon the action. fr. 25. § 7. D. 5. 3.—fr. 17. § 1. fr. 33. D. 6. 1.—§ 35. J. 2. 1.—fr. 48. pr. D. 41. 1.—fr. 25. § 1. D. 22. 1.—fr. 4. § 19. D. 41. 3. There is no such distinction found in the civil law as that made, between a *prædo* and a titulary *malæ fidei possessor*, by *Madai* in the Z. für Civ. R. und Proc. Vol. 11. No. 1. See *Vangerow*, l. c. § 333.

(*c*) const. 3. C. 3. 32. "Mater tua vel maritus fundum tuum invita vel ignorante te vendere jure non potuit, sed rem tuam a possessore vindicare, etiam non oblato pretio, poteris. Sin autem postea de ea venditione consensisti, vel alio modo proprietatem ejus amisisti, adversus emtorem quidem nullam habes actionem, adversus venditorem vero de pretio negotiorum gestorum actionem exercere non prohiberis."—const. 23. C. ibid. "Si mancipium tuum per vim vel furtum ablatum alii ex nulla justa causa distraxerunt, vindicanti tibi dominium *solvendi pretii nulla necessitas irrogetur*."—const. 2. C. 6. 2. "*Incivilem rem desideratis, ut agnitas res furtivas non prius reddatis, quam pretium fuerit solutum a dominis*. Curate igitur cautius negotiari, ne non tantum in damna hujusmodi, sed etiam in criminis suspicionem incidatis." The defendant's only remedy on that account is a resort to his *auctor*.—const. 16. C. 8. 45. "Super emti agri quæstione disceptabit Præses provinciæ, et si portionem diversæ partis esse cognoverit, impensas, quas ad meliorandam rem vos erogasse constiterit, habita fructuum ratione restitui vobis jubebit. *Nam super pretio evictæ portionis non eum, qui dominium evicerit, sed auctricem convenire, consequens est*."—const. 1. C. 3. 19. "In rem actio non contra venditorem, sed contra possidentem competit. Frustra itaque desideras non tecum congredi, sed cum auctore tuo dominum vindicantem, quum te possidere contendas. Nam si denunciasti ei, qui tibi vendidit, *intelligis, evictionis illi periculum imminere*. Nec enim jurisdictionis forma, in eadem provincia constitutis tam petitore quam possessore, ob auctoris personam, quem in alia provincia dicis consistere, debet immutari."—On the exceptions to this rule, see: const. 16. C. 5. 71.—fr. 6. § 8. D. 3. 5. (Julianus) "Si Titii servum putans, qui erat Sempronii, *dedero pecuniam, ne occideretur*, ut Pomponius ait, habebo negotiorum gestorum adversus Sempronium actionem."—fr. 6. D. 49. 15.

(*d*) A possessor, whether *bonæ* or *malæ fidei*, can claim compensation for expenses employed on the fruits only in case and so far as he restores the latter. fr. 36. § 5. D. 5. 3. (Paulus) "*Fructus intelliguntur deductis impensis, quæ quærendorum, cogendorum, conservandorumque eorum gratia fiunt*. Quod non solum in bonæ fidei possessoribus naturalis ratio expostulat, verum etiam in prædonibus, sicut Sabino quoque placuit."—fr. 46. D. 22. 1. (Ulpianus) "Quod in *fructus re-*

sariæ, compensation must be made for them, whether the defendant be *possessor bonæ* or *malæ fidei*;[a] if they are *impensæ utiles*, a compensation may regularly be required by the *possessor bonæ fidei*, while a *possessor malæ fidei* has only the right to take away what was added in this manner, and keep it for himself; if they are *impensæ voluptuariæ*, no regard is paid to *bona* or *mala fides*, and the defendant is never entitled to demand compensation, but has only the right to take away the additions, as far as this may be practicable without injury to the principal thing; but he must leave with the principal thing what he has added to it, if the proprietor prefers to take it and pay for it.[b] Among the Romans, these counter-claims of the defendant gave him only a right of retention, and not a right of action;[c] in Germany he is allowed the latter also.[d]

B. Publiciana in rem actio.*

§ 290. Besides the *rei vindicatio* of the civil law, which is the proper action for the recovery of property, there is, according to the prætorian

digendos impensum est, non ambigitur, ipsos fructus deminuere debere."

(*a*) const. 5. C. 3. 32. A thief only is not entitled to compensation even for necessary expenses employed on the thing. fr. 13. D. 13. 1. (Paulus) "Ex argento surrepto pocula facta condici posse, Fulcinius ait. Ergo in condictione poculorum etiam cælaturæ æstimatio fiet, quæ impensa *furis* facta est, quemadmodum si infans surreptus adoleverit, *æstimatio fit adolescentis, quamvis cura et sumtibus furis creverit.*" — const. 1. C. 8. 52.

(*b*) fr. 27. § 5. D. 61.—fr. 37. D. 6. 1. (Ulpianus) "Julianus libro octavo Digestorum scribit: 'Si in aliena area ædificassem, cujus bonæ fidei quidem emtor fui, verum eo tempore ædificavi, quo jam sciebam alienam: videamus, an nihil exceptio prosit; nisi forte quis dicat, prodesse de damno sollicito.' Puto autem huic exceptionem non prodesse: nec enim debuit, jam alienam certus, ædificium ponere; *sed hoc ei concedendum est, ut sine dispendio domini aream tollat ædificium quod posuit.*"—fr. 38. D. ibid (Celsus) "In fundo alieno, quem imprudens emeras, si ædificasti aut conseruisti, deinde evincitur: bonus judex varie ex personis causisque constituet. Finge et dominum eadem facturum fuisse: reddet impensam, ut fundum recipiat, usque eo duntaxat, quo pretiosior factus est, et si plus pretio fundi accessit, solum, quod impensum est. Finge pauperem, cui, si reddere id cogatur, laribus sepulchrisque avitis carendum sit: sufficiet tibi permitti tollere ex his rebus, quæ possis, dum ita, ne deterior sit fundus, quam si initio non foret ædificatum. Constituimus vero, ut, si paratus sit dominus tantum dare, quantum habiturus esset possessor his rebus ablatis, fiat ei potestas; neque malitiis indulgendum est, si tectorium puta, quod induxeris, picturasque corradere velis, nihil laturus, nisi ut officias. Finge eam personam esse domini, quæ receptum fundum mox venditura sit: nisi reddat, quantum prima parte reddi oportere diximus; eo deducto, tu condemnandus es."—fr. 38. D. 5. 3.—fr. 9. D. 25. 1.—*const.* 5. C. 3. 32.—*Buchholtz*, Jur. Abh. p. 16–21. and p. 399.

(*c*) fr. 23. § 4. D. 6. 1. (quoted above, p. 278. note *b*.) — fr. 4. § 9. D. 44. 4. (Ulpianus) "Si minor mihi infantem donaverit, deinde eum vindicet, *exceptione doli mali repellendus est*, nisi alimenta reddat, et si quis alius sumtus probabilis in eum factus sit."—fr. 24. D. 6. 1. (Gaius) "Is, qui destinavit rem petere, animadvertere debet, an aliquo interdicto possit nancisci possessionem, *quia longe commodius est ipsum possidere, et adversarium ad onera petitoris compellere, quam alio possidente petere.*"—fr. 14. § 1. D. 10. 3.—fr. 33. D. 12. 6.—*Francke*, Erläuterung versch. Rechtsmaterien. Vol. 1. No. 2.

(*d*) Contra: *Kämmerer* in the Z. für Civ. R. u. Proc. Vol. 8. Nos. 1. 2. 3.

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* In order to a proper understanding of the nature of the *actio Publiciana*, it will be well to make here a few remarks, which will at the same time serve to elucidate what was said by us at pp 267. 268. concerning bonitary ownership. Originally the *actio Publiciana* applied chiefly, though not exclusively, to bonitary ownership, and in general to every *possessio ad usucapionem*. Were we to set out from the erroneous sup-

law, another action for the recovery of a thing acquired in good faith by transfer; and this is called, after the prætor *Publicius*, who first introduced it, the *Publiciana in rem actio*.[a] 1. This action, it is true, was

(a) § 4. J. 4. 6.—D. 6. 2.—*Donelli* Comm. jur. civ. Lib. 20. c. 8.—*Glück*, Comm. Vol. 8. § 593–599.—*Schöman*, Handb. des Civ. R. Vol. 2. p. 47.—*Gesterding*, Eigenthum. § 51–57.—*Schnaubert*, Diss. sistens observatt. ad L. 1. pr. D. de Publiciana in rem actione. Jena, 1810.—*Van Massow* de Publiciana in rem actione; in the Annal. Acad. Leyden, 1816.—*Schollært* de Publiciana in rem actione. Louvain, 1820.—*Eckenberg*, Diss. de Publiciana actione. Leipsic, 1821.—*Guyet* de Publiciana in rem actione. Heidelberg, 1823.—

position that the *Publiciana actio* was used solely for bonitary ownership, we would arrive at the conclusion, that when Justinian abolished the distinction between bonitary and quirital ownership, this action was tacitly abolished likewise; but such was certainly not the case, since Justinian in his compilations has every where retained the *Publiciana actio* with all its distinctive features. This action was in fact introduced for the possessor *ad usucapionem*, whom the prætor by way of fiction (or rather presumption) regarded as a proprietor, his object being to protect him who had the better right to the thing. According to the older Roman law, a person who had acquired a thing in good faith by a legal transaction and delivery, if his predecessor was not already proprietor or he himself had not acquired it by prescription, had no property action, not even against a possessor who held by an inferior right. The prætor however assumed that he who had acquired a thing in good faith and by a legal title, even when he would not or could not prove ownership on the part of his predecessor, or could not complete the term of prescription because he had lost the possession of it, must be protected against him who possesses *infirmiore jure* (and hence especially, against him who lacks *bona fides* or a *justa causa*). The plaintiff moreover is only required to show that he was *in bona fide* at the time of acquiring the thing; subsequent bad faith (*mala fides superveniens*) does not injure him: for the provisions of the canon law respecting CONTINUA *bona fides* have reference only to prescription, and not to the *actio Publiciana*, the more so as this action does not go at all against the true proprietor, and is based entirely on the supposition that the plaintiff has acquired the thing lawfully and in good faith, which is the foundation of the presumptive prætorian ownership. Hence the Publician action may be brought even in the case of a title which (as for instance *legatum*, *donatio mortis causa*, *adjudicatio*, &c.) does not make the transfer of the property depend on delivery. There are however some cases in which the *actio Publiciana* may be employed even against a true proprietor: as for instance where the defendant in possession has acquired the ownership of the thing subsequently to his sale of the same; for here his plea of property (*exceptio dominii*) is defeated by the plaintiff's *replica doli s. rei venditæ et traditæ*. In order to present the subject as clearly as possible, we will give in conclusion a brief comparison of the property actions.

The *rei vindicatio* as well as the *Publiciana actio* is an *actio in rem*: they agree in their aim, as each of them is brought in order to compel the defendant to surrender the thing sued for *cum omni causa*; both proceed on the supposition that the object is a corporeal thing, that the defendant against whom they are brought is in possession, that the plaintiff can prove his right of ownership in the thing, and that a previous suit must be brought for separation (the *actio ad exhibendum*), in case the object claimed is connected with another thing (see our note, p. 198).

They differ, on the other hand, as follows: 1. The *rei vindicatio* belongs only to the true proprietor; the *Publiciana actio* belongs both to the true proprietor and to the *possessor ad usucapionem* (is *qui est in conditione usucapiendi, i.e. qui possidet bona fide et ex justa causa*). 2. The *rei vindicatio* applies against every third possessor; the *Publiciana actio* applies only against a possessor who has a weaker right. 3. In the *rei vindicatio*, the plaintiff who holds *titulo derivativo* must prove not only his own acquisition of ownership, but also the former ownership of his predecessors; in the *Publiciana actio* the plaintiff needs prove only his own prescriptive possession.—It may be remarked here, that the expression "to vindicate," in its more extended sense, is used to signify, *to enforce the rights of ownership* in a thing, whether by means of the *rei vindicatio* or of the *Publiciana actio*.

is always in favour of this unrestrictedness and exclusiveness or freedom of property. Property, however, may be limited in either of these respects (§ 260), and the ground of such restraint may lie either in the will of the proprietor himself or in a provision of law.

II. Legal Restrictions of Property.[a]

286. To the *legal* restrictions of property belong—in addition to the prohibitions of alienation, servitudes, and liens imposed by the law[b]—especially the following: 1. The proprietor must not directly endanger his neighbour's building by digging too deep on his own land.[c] 2. In putting up a new building, he must keep at a certain distance from his neighbour's boundary.[d] 3. He must erect no building on his own land whereby his neighbour's threshing-floor would be

injuria. Gallus enim dubitat an excipi oporteat, quod incendii defendendi causa factum sit? Servius autem ait: si id magistratus fecisset, dandam esse; privato non esse idem concedendum; si tamen quid vi aut clam factum sit, neque ignis usque eo pervenisset, simpli litem æstimandam; *si perveniset, absolvi eum oportere.* Idem, ait, esse, si damni injuria actum foret. *quoniam nullam injuriam aut damnum dare videretur, æque perituris ædibus.* Quodsi nullo incendio id fecerit, deinde postea incendium ortum fuerit, non idem erit dicendum, quia non ex post facto, sed ex presente statu damnum factum sit necne, æstimari oportere, Labeo ait."—*Kritz*, Abhandl. über Materien des Civilr. Leipsic, 1824. p. 79–100.—Contra: *Thibaut* in the Archiv Civ. Prax. Vol. 8. p. 139.

(*a*) See in general, *Schweppe's* Röm. Privatrecht. Vol. 2. § 227–233. 259.

(*b*) See § 185, § 291. 5., and Book I. chap. 6.

(*c*) fr. 24. § 12. in fin. D. 39. 2. On some excepted cases, in which a special permission is required for erecting buildings, see fr. 3. pr. D. 50. 10.—*Gesterding*, Nachforschungen. Vol. 3. p. 391.

(*d*) fr. 13. D. 10. 1. (Gaius) "Sciendum est, in actione finium regundorum illud observandum esse, quod ad exemplum quodammodo ejus legis scriptum est, quam Athenis Solonem dicitur tulisse. Nam illic ita est: *Ἐάν τις αἰμασίαν παρ' ἀλλοτρίῳ χωρίῳ ὀρυγῇ, τὸν ὅρον μὴ παραβαίνειν· ἐὰν τειχίον, πόδα ἀπολείπειν· ἐὰν δὲ οἴκημα, δίο πόδας· ἐὰν δὲ τάφον ἢ βόθρον ὀρύττῃ, ὅσον τὸ βάθος ᾖ, τοσοῦτον ἀπολείπειν· ἐὰν δὲ φρέαρ ὀργυιάν· ἐλαίαν δὲ, καὶ συκῆν ἐννέα πόδας ἀπὸ τοῦ ἀλλοτρίου φυτεύειν· τὰ δὲ ἄλλα δένδρα πέντε πόδας.* (Si quis sepem ad alienum prædium fixerit infoderitque, *terminum ne excedito*; si maceriam, *pedem relinquito*; si vero domum, *pedes duos.* Si sepulchrum aut scrobem foderit, *quantum profunditatis habuerint, tantum spatii relinquito*; si puteum, *passus latitudinem.* At vero oleam aut ficum *ab alieno ad novem pedes plantato*, ceteras arbores *ad pedes quinque.*)"—fr. 14. D. 8. 2. (Papirius Justus) Imperatores Antoninus et Verus Augusti rescripserunt: in area, quæ nulli servitutem deberet, posse dominum, vel alium voluntate ejus ædificare, *interposito legitimo spatio a vicina insula.*" — const. 12. § 2. C. 8. 10. "Quia vero nostra constitutio dicit, eum, qui ædificaturus est, inter suam et vicini domum, duodecim pedum interstitium relinquere oportere, et plus minusve addit, quod quidem maximam securitatem præstat (dubia enim ad tollendam ambiguitatem non sunt idonea), perspicue jubemus, inter utramque domum duodecim pedum intercapedinem esse, quæ ab ædificio fundamentis imposito incipiat, atque usque ad summam altitudinem conservetur; ceterum qui hoc observat, ei licere in quamcunque velit altitudinem *domum* tollere, et fenestras prospectitias, ut vocantur, et luciferas facere secundum sacram legislationem, sive novam domum ædificare velit, sive veterem instaurare, sive igne consumtam reficere; nec tamen ex hoc intervallo contrahi vicini prospectu in mare recto neque impedito, quem vicinus in propria domo stans vel etiam sedens habet, nec dum cogit eum, ut ex transverso adspiciat, et ut mare videat se torqueat. De hortis enim et arboribus nec in priore legislatione tractatum est, nec quidquam præsenti addetur; neque enim convenit."—const. 9. 11. C. 8. 10. It is more especially necessary with respect to a *sterculinium* or *latrina.* fr. 17. § 2. D. 8. 5. (Alfenus) "Secundum cujus parietem vicinus sterculinium fecerat, ex quo paries madescebat; consulebatur, quemadmodum posset vicinum cogere, ut sterculinium tolleret? Respondi: si in loco publico id fecisset, *per interdictum cogi posse*, sed si in privato, *de servitute agere oportere*; sed si damni infecti stipulatus esset, *posse per eam stipulationem*, si quid ex ea re sibi damni datum esset servare."—fr. 3. D. 39. 3.—*Gesterding*, Nachforschungen. Vol. 3. p. 398.

deprived of the necessary draught of air.[a] 4. The piece of ground which is lowest must receive the rain-water that runs off the higher one, and the proprietor must not hinder the natural flowing off of the water by any obstructions. On the other hand, the proprietor of the higher piece of ground must not lead the water on to the lower one, by artificial contrivances, either in a large mass or in a new direction; otherwise the *actio aquæ pluviæ arcendæ* will lie against him.[b] 5. With

(*a*) const. 14. § 1. C. 3. 34. "Quum autem apertissimi juris est, fructus aridos conculcatione, quæ in area fit, suam naturam et utilitatem ostendere, aliquis vicinum suum vetabat ita ædificium extollere juxta aream suam, ut ventus excluderetur et paleæ ex hujusmodi obstaculo secerni a frugibus non possent, quasi vetito vento suam vim per omnem locum inferre ex hujusmodi ædificatione, quum secundum situm regionis et auxilium venti aream accedit. Sancimus itaque, nemini licere sic ædificare vel alio modo versari, ut idoneum ventum et sufficientem ad præfatum opus infringat, et inutilem domino aream et fructuum inutilitatem faciat." The same must be said of a windmill, in case the new building would entirely keep the wind from the mill. Another opinion is advanced by *Bülow* and *Hagemann*, Pract. Erörterungen. Vol. 4. No. 2.

(*b*) fr. 1. § 1. 2. D. 39. 3. (Ulpianus) "Hæc autem actio (scil. aquæ pluviæ arcendæ) locum habet in damno nondum facto, opere tamen jam facto, hoc est *de eo opere, ex quo damnum timetur*, totiesque locum habet, quoties manu facto opere agro aqua nocitura est, *id est, cum quis manu fecit, quo aliter flueret, quam natura soleret*, si forte immittendo eam aut majorem fecerit, aut citatiorem, aut vehementiorem, aut si comprimendo redundare effecit. *Quodsi natura aqua noceat, ea actione non continetur.* § 2. Neratius scribit: *Opus, quod quis fecit, ut aquam excluderet, quæ exundante palude in agrum ejus refluere solebat, si ea palus aqua pluvia ampliatur, eaque aqua repulsa eo opere agris vicini noceat, aquæ pluviæ actione cogetur tollere.*—fr. 1. § 18. D. ibid. Nec illud quæramus: unde oriatur? nam et si publico oriens vel ex loco sacro per fundum vicini descendat, *isque opere facto in meum fundum eam avertat, aquæ pluviæ arcendæ teneri eum*, Labeo ait.—fr. 1. § 22. D. ibid. Sed si vicinus opus tollat et sublato eo *aqua naturaliter ad inferiorem agrum perveniens noceat*, Labeo existimat aquæ pluviæ arcendæ agi non posse; semper enim hanc esse servitutem inferiorum prædiorum, ut natura profluentem aquam excipiant. *Plane si propter id opus sublatum vehementior aqua profluat vel corrivetur, aquæ pluviæ arcendæ actione agi posse*, etiam Labeo confitetur. § 23. Denique ait: conditionibus agrorum quasdam leges esse dictas, ut, in quibus agris magna sint flumina, liceat mihi scilicet in agro tuo aggeres vel fossas habere; si tamen lex non sit agro dicta, agri naturam esse servandam, *et semper inferiorem superiori servire, atque hoc incommodum naturaliter pati inferiorem agrum a superiore*, compensareque debere cum alio commodo; sicut enim omnis pinguitudo terræ ad eum decurrat, ita etiam aquæ incommodum ad eum defluere; si tamen lex agri non inveniatur, *vetustatem vicem legis* tenere. Sane enim et in servitutibus hoc idem sequimur, ut, ubi servitus non invenitur imposita, qui diu usus est servitute neque vi, neque precario, neque clam, habuisse longa consuetudine velut jure impositam servitutem videatur. Non ergo cogemus vicinum aggeres munire, sed nos in ejus agro muniemus, eritque ista quasi servitus. In quam rem utilem actionem habemus vel interdictum."—*Schneider* in the Z. f. Civil. R. u. Proc. Vol. 5. p. 325. —The same principle applies to public rivers; hence nobody is entitled to erect any thing in or over a public river, not even on his own ground, whereby the course of the river would be altered so as to injure a neighbour and impede him in his former use of the water. fr. 1. § 2–7. D. 43. 13.—fr. 1. § 1. D. 43. 13. (Ulpianus) "Hoc interdicto *prospexit Prætor, ne derivationibus minus concessis flumina exarescant, vel mutatus alveus vicinis injuriam aliquam afferat.*"—fr. 3. § 1. D. 43. 20. (Pomponius) "Ex flumine aquam ducere plures possunt, *ita tamen, ut vicinis non noceant*, vel si angustus amnis sit, etiam ei, qui in alia ripa sit."—fr. 1. § 11. D. 43. 21.—fr. 1. § 4. in fin. D. 39. 3. (Ulpianus) "Sed et fossas agrorum siccandorum causa factas, Mucius ait, fundi colendi causa fieri, non tamen oportere derivandæ aquæ causa fieri; sic enim debere quem meliorem agrum suum facere, *ne vicini deteriorem faciat.*"—fr. 17. D. 8. 3. (Papirius Justus) "Imperatores Antoninus et Verus Augusti rescripserunt: aquam de flumine publico pro modo possessionum ad irrigandos agros dividi oportere, nisi proprio quis jure plus sibi datum ostenderit. Item rescripserunt: aquam ita demum permitti duci, *si sine injuria alterius id fiat.*"—const. 2. C. 3. 35. "Legis Aquiliæ actione expertus adversus eum, quem domum tuam deposuisse vel incendio concremasse, damnoque te affixisse proponis, ut id damnum sarciatur, competentis judicis auctoritate consequeris. Quin *etiam si aqua per injuriam alio derivata sit, ut in priorem statum restituatur*, ejusdem judicis cura impetrabis."—const. 4. C. 3. 34. "*Aquam*, quæ in alieno loco oritur, *sine voluntate ejus*, ad quem usus ejusdem aquæ pertinet, *prætoris edictum non permittit ducere.*"—const. 7. C. ibid. "Si manifeste do-

TITLE FOURTH.

LOSS OF PROPERTY.

§ 292. The right of ownership may terminate either agreeably to the owner's will or against his will:[a]

I. It terminates with his consent: 1. when he relinquishes the thing, without transferring it to another;[b] 2. when he transfers the ownership of the thing to another.[c]

II. It terminates against his will: 1. physically—*a.* when the thing perishes; *b.* when a wild animal that has been caught or held as property makes its escape, or when a tamed one leaves off the habit of coming back:[d] 2. juridically—*a.* when the thing becomes a *res extra commercium*;[e] *b.* when an enemy recaptures the booty that had been taken from him;[f] *c.* when another, against the will of the proprietor, acquires it by specification, accession, adjudication, or prescription. The right of property, however, is not extinguished by the owner's death, but descends to his heirs.

(*a*) *Gesterding*, Eigenthum. § 58. 59.

(*b*) § 47. J. 2. 1.—fr. 2. § 1. D. 41. 7. (Paulus) "Sed Proculus: 'non desinere eam rem domini esse, nisi ab alio possessa fuerit;' Julianus: '*desinere quidem omittentis esse*, non fieri autem alterius, nisi possessa fuerit;' et recte."—fr. 17. § 1. D 41. 1.

(*c*) fr. 31. pr. D. 41. 1. (Idem) "Nunquam nuda traditio transfert dominium, sed ita, si *venditio aut aliqua justa causa* præcesserit, propter quam traditio sequeretur."—const. 20. C. 2. 3.

(*d*) § 12. J. 2. 1.—§ 15. in fin. J. ibid. "In iis autem animalibus, quæ ex consuetudine abire et redire solent, talis regula comprobata est, ut eousque tua esse intelligantur, donec animum revertendi habeant. Nam si revertendi animum habere desierint, etiam tua esse desinunt, et fiunt occupantium. Revertendi autem animum videntur desinere habere, cum revertendi consuetudinem deseruerint."—fr. 5. § 5. D. 41. 1—This rule does not apply to tame animals. fr. 5. § 6. D. ibid.

(*e*) fr. 23. D. 7. 4. (quoted above p. 232. note *b*).—fr. 1. § 5. D. 43. 12. (Ulpianus) "Ripa autem ita recte definietur: id, quod flumen continet, naturalem rigorem cursus sui tenens. Ceterum si quando vel imbribus, vel mari, vel quo alia ratione ad tempus excrevit, ripas non mutat. Nemo denique dixit, Nilum, qui incremento suo Ægyptum cooperit, ripas suas mutare vel ampliare Nam quum ad perpetuam sui mensuram redierit, ripæ alvei ejus muniendæ sunt. Si tamen flumen naturaliter creverit, ut perpetuum incrementum nactum sit, vel alio flumine admixto, vel qua alia ratione, dubio procul dicendum est, ripas quoque ipsum mutasse, quemadmodum si alveo mutato alia cœpisset currere." fr. 1. § 7. D. ibid. (Idem) "Simili modo et si flumen alveum suum reliquerit et alia fluere cœperit, quidquid in veteri alveo factum est, ad hoc interdictum non pertinet; non enim in flumine publico factum erit, quod est utriusque vicini. At si limitatus est ager, occupantis alveus fiet; certe desinit esse publicus. Ille etiam alveus, quem sibi flumen fecit, etsi privatus ante fuit, incipit tamen esse publicus, quia impossibile est, ut alveus fluminis publici non sit publicus."—See above, § 146. note *a*.

(*f*) § 17. J. 2. 1. (quoted above p. 276. note *c*.)—fr. 5. § 1. D. 49. 15. (Pomponius) "Postliminii jus competit aut in bello, aut in pace. § 1. In bello, cum hi, qui nobis hostes sunt, aliquem ex nostris ceperunt, et intra præsidia sua perduxerunt; *nam si eodem bello is reversus fuerit, postliminium habet*, id est, perinde omnia restituuntur ei jura, ac si captus ab hostibus non esset. Antequam in præsidia perducatur hostium, manet civis; tunc autem reversus intelligitur, si aut ad amicos nostros perveniat, aut intra præsidia nostra esse cœpit."—fr. 19. pr. D. ibid. (Paulus) "Postliminium est jus amissæ rei recipiendæ ab extraneo, et in statum pristinum restituendæ inter nos ac liberos, populos regesque, moribus ac legibus constitutum. Nam quod bello amisimus, aut etiam citra bellum, *hoc si rursus recipiamus, dicimur postliminio recipere*. Idque naturali æquitate introductum est, ut, qui per injuriam ab extraneis detinebatur, is, ubi in fines suos redisset, pristinum jus suum reciperet."—fr. 30. D. ibid. (Labeo) "Si id, quod nostrum hostes ceperunt, ejus generis est, ut postliminio redire possit, simulatque ad nos redeundi causa profugit ab hostibus, et intra fines imperii nostri esse cœpit, postliminio redisse existimandum est. Paulus: Immo cum servus civis nostri ab hostibus captus inde aufugit, et in urbe Roma ita est, ut neque in domini sui potestate sit, neque alli serviat, nondum postliminio redisse existimandum est."

CHAPTER IV.

SERVITUDES.*

§ 293. The system of property of a state is a matter of vital importance to the welfare of the people, and to their attainment of the higher ends of their being; because the property of the citizen is the only remnant left him by the state, of the dominion over nature originally granted to man. In fact, personal freedom, and with it the moral and physical well-being of men, is most essentially concerned in the preservation of the freedom of things. A crippling of both these kinds of freedom, by making the person dependent on the thing, is a course of policy which should be discarded both in a moral and a politico-economical point of view; since it infuses into the body politic a poison which corrupts its humours and undermines its strength, and which cannot be expelled without imminent danger and convulsive throes. On the contrary, a mere restriction of *real* freedom, which leaves personal freedom unimpaired, and is not carried beyond natural and reasonable limits, may be perfectly safe and consistent with the

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* The Roman rights of things consisted of two principal classes: *ownership*, and *real rights* in things belonging to another. To the latter belong servitudes, emphyteusis, superficies, and pawn and mortgage. Real rights correspond to ownership in so far that a *thing* forms their immediate object; but again they differ from it inasmuch as they make the thing subject to one's dominion only in certain respects, while in all other respects it is subject to the ownership of another. Rights of things are distinguished from rights of obligation by the fact that they give an independent right immediately in the thing itself, and hence apply against every third person; whereas rights of obligation give no other than mere personal rights to the thing, and consequently apply only against the grantor.

We will here remind the reader of Chancellor Kent's remarks (Comm. Vol. 3. p. 436.) concerning the Roman doctrine of servitudes. He says: "The regulations in the civil law on the subject of urban and rural servitudes were just and equitable, and the provisions made to define and protect those rights, were far more minute and precise than those which are to be found on the same subjects in the books of the common law; and it is difficult to solve many questions arising on those rights, without having recourse to the solid and luminous principles of the civil law which are of permanent and universal application.—M. Fournel, when speaking of the Roman law in relation to this subject, says that *Quelque chose que vous demandez aux lois Romaines, elles vous en fournissent la réponse;* and we may say of that law, as the younger Pliny said of Titus Aristo, who was an accomplished lawyer and his particular friend: *Nihil est quod discere velis, quod ille docere non possit.*"

As to the application of the Roman principles of servitudes in Germany, they are still in force there to the present day, although some modifications have been introduced by the German law. Thus, for instance, the German law recognises servitudes that have been granted to a corporation, and also some kinds of usufruct which deviate in some respects from the Roman *usufructus*. According to the law of several German states, the servitudes which encumber land are required to be registered in the public records. *Mittermaier* (Grundsätze des deutschen Privatrechts, 6th edit. Regensburg, 1842. § 166) insists that such registry should be every where adopted; since the true condition and worth of any property cannot be estimated without a knowledge of the burthens which encumber it, and which often seriously diminish its value.

general interests. The Romans seem to have been so deeply impressed with a conviction of the importance of the freedom of things, that they transferred the principle of freedom of the person to freedom of the thing, or, in other words, that of *personal* freedom to *real* freedom; and that they were so jealous both of personal and *real* freedom, as to entirely reject the so-called *real* burdens, and to treat with a certain degree of rigour and disfavour even the servitudes, which in principle were perfectly innocent. Hence the Romans would not tolerate any restrictions of personal freedom through restrictions of the freedom of things, nor encourage a division of the dominion over a thing. They adhered to the praiseworthy view, that personal freedom ought to be restricted only through personal obligations, and not by restrictions on the freedom of a thing for every future possessor, and that the thing, thus free for all times and for all future possessors, should have *at one and the same time only one* dominus over it, and that his dominion should constantly remain as little circumscribed as possible, and not be diminished by dividing his prerogatives among several persons. The only true restrictions of property recognised by them were the *servitudes*; for emphyteusis, superficies, and pawn and mortgage, are to be regarded rather as transfers of ownership to another. The grantor of emphyteusis or superficies ceases in a manner to be the practical owner: since, by virtue of such grant or division of the powers residing in ownership, he transfers the majority of them to the emphyteuta or superficiarius; and the dominion, although in a legal point of view reserved to himself and his successors, in fact only results back to him upon certain conditions; and a pawn or mortgage is properly nothing *else but* a conditional transfer of the dominion over the thing—a *forfeiture* as it were of the thing or of the dominion over it consequent upon the non-fulfilment of a personal obligation, in lieu of the original forfeiture of the person or of personal freedom.* K.

* Entirely different from the Roman system of property was that of the Germanic nations in respect to real estate, which so powerfully and steadily aided in enslaving the people of Europe. Tacitus (Germ. xxvi.), it is true, in speaking of the Germans of his time (among whom, in their then low grade of civilization, capital of course did not possess that value which it had among the Romans), praises them, saying: "Usury is so utterly unknown to them, that they have not even prohibited it." Yet however pernicious may be the wounds inflicted upon the industrious classes of the community by the exactions of relentless avarice, and however imperiously an earnest and vigilant coöperation of law, justice, and public opinion may be demanded for the purpose of mitigating this great and crying evil, it is still clear that no money-usury—even when carried publicly and privately to the extent to which it formerly was among the Romans and now is among the civilized nations of the present day—can occasion mischiefs at all to be compared to the dire consequences of property-usury among the Germans of the middle ages. In consequence of their political relations, real estate could accumulate to excess in the hands of individuals, and (what should always be prohibited

TITLE FIRST.

NATURE AND GENERAL PRINCIPLES.

I. Servitude of a thing.[a]

§ 294. *Free ownership of a thing* (*libertas rei*) exists where the owner thereof is not restricted in any respect, and is therefore entitled to exercise all the rights contained in the property according to its legal nature. This freedom of ownership manifests itself, as we have seen above (§ 285), in two different ways. Thus, 1. the owner by virtue thereof is entitled *to do* every thing that ownership can authorize him to do, and that in general without any regard to the question whether

(*a*) SOURCES: *Gaius*, II. 28–33.—Inst. II. 3–5.—Dig. VII and VIII.—Cod. III. 33 and 34. — LITERATURE: *Donelli* Comm. jur. civ. Lib. 9. c. 21. 22. Lib. 10. and 11.—*Merillii* Commentar. in titt. Dig. de servitutibus; in Otto's Thesaurus. Vol. 3. p. 613. — *Jani a Costa*, Comm. s. Præl. ad titt. Dig. de servitutibus; in Meerman's Thesaurus. Vol. 1. p. 697.—*D'Avezan*, Servitutum Liber; in Meerman's Thes. Vol. 4. p. 119.—*Westphal* de libertate et servitutibus prædiorum. Leipsic, 1773.—*K. S. Zachariä* in Hugo's Civ. Mag. Vol. 2. No. 15.—*Münter*, Von den Servituten. 2. Vols. Hanover, 1806. 1810.—*Glück*, Comm. Vols. 9 and 10 up to § 690.—*Luden*, Die Lehre von den Servituten. Gotha, 1837. —*E. Hofmann*, Die Lehre von den Servituten, Vol. 1. Darmstadt, 1838.

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by a wise legislation) the landed proprietors were allowed to make contracts by which the property-usury could be perpetuated to the advantage of an indolent minority although ruinous to the mass of the people. The deepest wounds were every where inflicted by the feudal system; but they fell with peculiar force on the peasantry, in consequence of the manorial grants of lands, which imposed the most galling fetters on both personal and *real* freedom. The rural tenant, surrendered to the arbitrary will and caprice of his lord and with no protection from the most oppressive treatment, was destitute of any right to dispose of the land or even of the wretched produce of his labour; and where his right in the land was of a permanent and more certain nature, he was still, in addition to other dues from the land, subjected to oppressive imposts on all that he produced (gifts and tithes of corn, fruits, cattle, &c.); was obliged to perform services with his hands, horses, carts, implements of husbandry, &c., and to sacrifice a large portion of his time and labour to the use and behoof of his lord and for the promotion of his agricultural, manorial, and private interests. In order to make all these rights and obligations perpetual, property was crippled; for, the usurious grantor, in transferring the same, attached the dues reserved for himself and his successors, for ever to the property. This contrivance for as it were petrifying personal rights and obligations, by investing them with a *real* character, seemed too advantageous not to be extended to other relations. This was done with regard to licenses for certain trades: thus, for instance, the right of brewing beer was granted as a *real* monopoly to certain manorial and city breweries; so that the inhabitants of villages and districts were obliged to resort to these establishments for the supply of their wants. Traces of this vexatious and oppressive system of *real* rights of monopoly and prohibition, which bear like an incubus on the industry of the people and are injurious to the public in every way, are still to be met with both in the cities and in the country: thus in many parts of Germany the right of carrying on certain trades, as e. g. brewing, corn-grinding, distilling, inn-keeping, drug-selling, keeping retail-stores, barber-shops, &c., are attached as *real* privileges (*privilegia realia*) to certain estates in town and country—a fact more gratifying to the admirer of historical antiquities than to the friend of the human race. It is true that these mediæval rights do not owe their origin exclusively to the selfishness of princes, nobles, ecclesiastics, and corporations (thus for instance the monopoly of grinding corn was often granted to a mill, as a consideration to the miller for his outlay in erecting it, and to insure him a living from it); but as we

or not it tends to the prejudice or inconvenience of another;[a] and, 2. he can prevent every other person from interfering with his property or making any use of it, even though it would not prove disadvantageous to himself.[b] When the freedom of ownership is restricted in any respect, in consequence of a right in the thing held by another than the owner, it is said that the thing *serves* such other (*res servit*).[c]

The *servitude of a thing* (*servitus rei*), if we take the expression in its primary sense, signifies a restriction of the natural freedom of ownership in the same, which is effected by separating certain rights in the thing from the general rights of the owner, and granting them to another. A right of this description may be either one that binds the pro-

(*a*) fr. 151. D. 50. 17. (Paulus) "Nemo damnum facit, nisi qui id fecit, quod facere jus non habet." — fr. 155. § 1. D. ibid. (Idem) "Non videtur vim facere, qui *jure suo* utitur, et ordinaria actione experitur."—fr. 24. § 12. D. 39. 2. (Ulpianus) "Item videamus, quando damnum dari videatur? Stipulatio enim hoc continet, quod vitio ædium, loci, operis damnum fit; utputa in domo mea puteum aperio, quo aperto venæ putei præcisæ sunt, an tenear? Ait Trebatius: 'non teneri me damni infecti; neque enim existimari operis mei vitio damnum tibi dari in ea re, in qua jure meo usus sim.' Si tamen tam alte fodiam in meo, ut paries tuus stare non possit, damni infecti stipulatio committetur." — fr. 9. D. 8. 2. (quoted above, § 286.) — fr. 14. D. ibid. (see above p. 304. note *d*.)—Still the law does not permit the owner to use his rights for the mere purpose of injuring others. fr. 1. § 12. fr. 2. 9. D. 39. 3.—Nov. 63.—*Thibaut*, System des Pand. R. 7th Ed. § 56. and in Braun's Erörterungen. p. 67.—Comp. also above, § 285 and § 286. and the passages quoted p. 303. note *b*.

(*b*) fr. 13. § 7. D. 47. 10.—fr. 16. *D.* 8. 3. (see above, § 285. note *b*.) — const. 11. C. 3. 34. (quoted above, § 285. note *b*.)

(*c*) fr. 5. § 9. D. 39. 1. (Ulp.) "Qui, uti *optimæ maximæ sunt*, ædes tradit: non hoc dicit, servitutem illis deberi; sed illud solum, ipsas ædes liberas esse, hoc est, nulli servire."—A thing which is free from any servitude is called *res optima maxima*.—fr. 90. D. 50. 16. — fr. 169. D. ibid. (Paulus) "Non tantum in traditionibus, sed et in emtionibus, et stipulationibus, et testamentis adjectio hæc: *uti optimus maximusque est, hoc significat, ut liberum præstetur prædium*, non ut etiam servitutes ei debeantur."—Cicero de leg. agrar. III. 2 "Optimo enim jure ea sunt profecto, quæ optima conditione sunt. Libera meliore jure sunt, quam serva. Capite hoc omnia, quæ serviebant, non servient."

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no longer live in the middle ages, it is evident that this cannot shield the enemies of human progress from being responsible for a state of things which justifies the severe reproach placed by *Göthe* in the mouth of Mephistophiles:

I know how 'tis with this most subtle art.
Laws are hereditary, like the gout.
From sire to son descends the bitter smart,
From place to place it slily spreads about.
Sense becomes nonsense, kindness fearful wrong;
Alas, that thou a grand-child hast been born!
We ne'er shall hear a word, I dare be sworn,
Of innate rights that to all men belong.

It was very truly observed by Prof. *Zachariä* (in his excellent *Regierungslehre*, Vol. 1. p. 141 seq.), in speaking of the attempts made to perpetuate this oppressive system: "There formerly was in *all*, and still is in *most* of the states of Germanic origin a great number of estates burthened with base services, gifts, or *jura bannaria*. Although more than *one* cause can be adduced from history for this phenomenon, yet a complete explanation can hardly be found for that peculiar tendency of the peoples of Germanic origin to convert every relation of civil life (even the duties of allegiance and military service) into a *real* one, and thus to fetter it as it were to the ground. But greatly as this peculiarity is to be objected to on the score of right, it must be allowed that it had at least these beneficial effects, that it rendered the development of the national culture more steady, the political institutions more lasting, and the relations of dependence less oppressive. The present time strives after other and higher ends. It desires before all things to free the land from its burdens and fetters. It wishes to infuse life and motion into all social relations. Though at the same time it has to guard against another danger, that of giving *all* a prey to the whirlpool of change!"

prietor of the thing *not to do* something, or one that binds him to *suffer* something *to be done* for the advantage of the entitled party, which he as proprietor would otherwise be entitled to do or to prevent. In a derivative sense, however, the *rights* themselves which are founded on the servitude of a thing, are likewise termed *servitutes*; and this is the usual meaning of the word.[a]*

II. General Principles of Servitudes.

§ 295. The following general principles naturally proceed from the very essence of a servitude: 1. A servitude, being a right detached from the ownership of the thing itself, can be conceived of only as applying to the property of *another* in a *corporeal* thing, and consequently not to one's own property or to another servitude. Hence the rules

(a) § 3. J. 2. 2.—Inst. 2. 3.—Concerning the nature of the Roman *servitus* and *jus in re aliena*, see: *Savigny*, Besitz. p. 97.—*Hufeland*, Geist des Röm. Rechts. Vol. 2. Divis. 2. No. 9.—*Löhr*, in his Mag. Vol. 3. (1) p. 486.—*Zimmern*, Röm.-Rechtl. Untersuchungen. p. 102.—*Du Roi* in the Archiv Civ. Prax. Vol. 6. p. 252 seqq.—Contra: *G. F. Puchta* in the Rhein. Mus. Vol. 1. No. 4. p. 286.—*Guyet*, Abh. aus dem Civilrechte. p. 5.—*Unterholzner*, Verjährung. Vol. 2. § 191.—*Buchholtz*, Versuche. No. 14.

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* *Servitus* indeed also signifies the servitude of a person, or the state of slavery; but here that is not spoken of, and it is used only in the sense of the servitude of a *thing*. In the language of the Roman law, a thing is said to be servient, in which, although it is owned by another, we have a real right, by virtue of which and for the advantage of our person or property, we can require the owner or any possessor of the thing to suffer or omit to do something with respect to such thing, which he would not have to submit to, if the rights comprised in the ownership rested in himself undiminished. Servitude is therefore a *jus in re*, as distinguished from a *jus ad rem*: the former is a real right or a right in the thing itself, and consequently has effect against every third person; while the latter is a personal right or a right to the thing, and hence applies only against the actual obligee. If my neigbour burthens his land, for me or for the benefit of my land, with the *servitus compascui* or with the *servitus ne luminibus officiatur*, or gives me a right of usufruct therein. I have in each of these cases a *jus in re*, and every holder of the land must suffer me to pasture my cattle on it (*serv. comp.*), and enjoy the usufruct thereof (*ususfructus*); and he must abstain from erecting any thing on his ground or doing any thing to it whereby my light, my pasture, or my usufruct would be injured. If, on the contrary, he should lease or let out his land to me or grant me any other merely personal right to the thing, I have merely a *jus ad rem* (or *jus in personam*), by virtue of which I can only require of the grantor of the right, or those who may have succeeded to his duties, that he should suffer, or omit, or (in this case) even *do*, what I am entitled respectively to do, to prevent, or to *demand*.

With regard to the word *servitus*, it deserves to be noticed that originally it signified only the duty of service (*onus* servitutis); but through the usus loquendi of common life and of the law, it also acquired the meaning of right of service (*jus* servitutis). Such irregularities are met with in every language; we will instance only the word "*debt*," which is used to signify both the *debitum* and the *creditum*. It may therefore be said that *servitude* has both an active and a passive signification: in the former case it denotes the restrictive *right* belonging to the entitled party; in the latter, the restrictive *duty* entailed upon the proprietor or possessor of the servient land.

The right of servitude is distinguished from the right of pawn and mortgage (as is remarked by Zachariä, l. c. p. 138), by the fact that the former increases the property of the entitled party, while the latter only secures it.

of the Roman law: "*Nulli res sua servit*,"[a] and, "*Servitus servitutis esse non potest.*"[b] 2. A servitude can consist only in the owner's being bound *not to do* something with respect to the thing (*in non faciendo*; hence called *servitus negativa*), or in his being obliged to *suffer* something to be done (*in patiendo*; hence called *serv. affirmativa*). Consequently, it cannot consist in this, that the proprietor is *to do* something for the advantage of the party entitled (*in faciendo*). The proprietor may indeed bind himself to do something with respect to the thing for the advantage of his neighbour; yet this would establish no right in the thing itself, but merely a right of obligation.[c] 3. The servitude must secure some advantage to the person or thing entitled; therefore in case of a predial servitude it must enhance the value or agreeable-

(*a*) fr. 5. pr. D. 7. 6.—fr. 78. pr. D. 23. 3. (Trypboninus) "Cum in fundo mariti habens mulier usumfructum, dotis causa eum marito dedit, quamvis ab ea ususfructus discesserit, maritus tamen non usufructum habet, sed suo fundo quasi dominus utitur, consecutus per dotem plenam fundi proprietatem, non separatam ab usufructu; nec est, quod non utendo maritus amittat. Divortio autem facto, constituet in eodem fundo usumfructum mulieri. Quodsi in matrimonio decesserit uxor, nihil emolumenti ob dotem habere videtur maritus, quia, etsi uxorem eam non duxisset, tamen fructuariæ morte finitus ususfructus ad proprietatem rediret; ideoque nec in funus confert mulieris."—fr. 26. D. 8. 2. (Paulus) "In re communi nemo dominorum jure servitutis neque facere quicquam invito altero potest, neque prohibere, quominus alter faciat; nulli enim res sua servit. Itaque propter immensas contentiones plerumque res ad divisionem pervenit; sed et per communi dividundo actionem consequitur socius, quominus opus fiat, aut id opus, quod fecit, tollat, si modo toti societati prodest opus tolli."—A joint owner can have for himself a right of servitude in the thing which he holds in common with another. fr. 10. D. 7. 9. (Idem) "Si servi, qui nobis communis erat, usumfructum tibi legavero, necessaria erit hæc cautio heredi meo. Quamvis enim de proprietate possit communi dividundo judicio experiri, tamen causa ususfructus, qui tuus proprius est, ad officium communi dividundo judicis non pertinebit."—fr. 40. D. 8. 2. (Idem) "Eos, qui jus luminis inmittendi non habuerunt, aperto pariete communi nullo jure fenestras immisisse, respondi."—fr. 8. fr. 27. pr. D. 8. 2.

(*b*) fr. 1. D. 33. 2. (Paulus) "Nec usus, nec ususfructus itineris, actus, viæ, aquæductus legari potest, quia servitus servitutis esse non potest; nec erit utile ex senatusconsulto, quo cavetur, ut omnium, quæ in bonis sint, ususfructus legari possit, quia id neque ex bonis, neque extra bona sit. Sed incerti actio erit cum herede, ut legatario, quamdiu vixerit, eundi, agendi, ducendi facultatem præstet, aut ea servitus constituatur sub hac cautione, ut, si decesserit legatarius, vel capite deminutus ex magna causa fuerit, restituatur."—fr. 33. § 1. D. 8. 3. (Africanus) "Per plurium prædia aquam duci quoquo modo imposita servitute, nisi pactum vel stipulatio etiam de hoc subsecuta est; neque eorum cuivis, neque alii vicino poteris haustum ex rivo concedere. Pacto enim vel stipulatione intervenientibus et hoc concedi solet, quamvis nullum prædium ipsum sibi servire, neque servitutis fructus constitui potest."

(*c*) fr. 15. § 1. D. 8. 1. (Pomponius) "Servitutum non ea natura est, ut *aliquid faciat quis* (veluti viridaria tollat, aut amœniorem prospectum præstet, aut in hoc, ut in suo pingat); *sed ut aliquid patiatur, aut non faciat.*"—fr. 6. § 2. D. 8. 5. (Ulpianus) "Etiam de servitute, quæ oneris ferendi causa imposita erit, actio nobis competit, ut et onera ferat, et ædificia reficiat ad eum modum, qui servitute imposita comprehensus est. Et Gallus putat, *non posse ita servitutem imponi, ut quis facere aliquid cogeretur, sed ne me facere prohiberet*; nam in omnibus servitutibus refectionem ad eum pertinere, quisibi servitutem asserat, non ad eum, cujus res serviat. Sed prævaluit Servii sententia in proposita specie, ut possit quis defendere, jus sibi esse, cogere adversarium reficere parietem ad onera sua sustinenda. Labeo autem, hanc servitutem non hominem debere, sed rem, denique licere domino rem derelinquere, scribit."—fr. 81. § 1. D. 18. 1. (Scævola) "Lucius Titius promisit de fundo suo centum millia modiorum frumenti annua præstare prædiis Caii Seii; postea Lucius Titius vendidit fundum, additis verbis his: *quo jure, quaque conditione ea prædia Lucii Titii hodie sunt, ita venerit, itaque habebuntur.* Quæro: an emtor Caio Seio ad præstationem frumenti sit obnoxius? Respondi: *emtorem Caio Seio secundum ea, quæ proponerentur, obligatum non esse.*"—*Thibaut*, Versuche. Vol. 1. No. 2.—*Zachariä*, l. c. p. 336.—*Schöman*, Handb. des Civ. R. Vol. 1. p. 378.—*Johannknecht*, Exploratio quæstionis: an servitus in faciendo consistat. Gottingen, 1807.—*Hufeland*, l. c. p. 98.—*Buchholtz*, Versuche. Lubeck, 1808. No. 3.—

ness of the land entitled.[a] 4. A servitude establishes a real right in the thing servient; and therefore it may be enforced against every possessor of the thing.[b] 5. A thing is never presumed to be burdened with a servitude, where a doubt exists;[c] and where it is certain that a servitude has been established, the law requires that the judge, in interpreting the transaction by which it is created, should adopt the meaning most favourable to the owner, and that he on whom the servitude is conferred should exercise it exactly in the manner agreed upon, and always in such a way as may prove least burdensome to the proprietor.[d] 6. A servitude can be granted only by the true owner of

Schrader, Civ. Abh. p. 279.—*Goldschmidt* in the Archiv Civ. Prax. Vol. 1. p. 386.—*Dernburg*, Beiträge zur Geschichte der Testamente. p. 145.—*Seuffert*, Erört. II. p. 37.—*Guyet*, Abh. aus dem Civilrechte. p. 1. and comp. with it: *Zimmern* in Schunck's Jahrb. Vol. 12. p. 37.—With servitudes also a singular successor of the thing (therefore in a certain sense a *third* party), assumes rights and duties, and this distinguishes servitudes from rights of obligation. Indeed there occurs in the Roman law a right *to performances on the part of the person bound with regard to a thing*; but as this could be enforced only by means of a *persecutio extraordinaria*, it was not a servitude. fr. 7. pr. D. 39. 4. (Papirius Justus) "Imperatores Antoninus et Verus rescripserunt, *in vectigalibus ipsa prædia, non personas conveniri*; it ideo possessores etiam præteriti temporis vectigal solvere debere: eoque exemplo actionem, si ignoraverint, habituros."—fr. 39. § 5. D. 30. (Ulp.) "Heres cogitur legati prædii solvere vectigal præteritum, vel tributum, vel solarium, vel cloacarium, vel pro aquæ forma."—fr. 27. § 3. D. 7. 1. (quoted p. 331. note *c*).

(*a*) fr. 15. pr. D. 8. 1. (Pomponius) "Quoties nec hominum, nec prædiorum servitutes sunt, quia nihil vicinorum interest, non valent, veluti ne per fundum tuum eas, aut ibi consistas; et ideo si mihi concedas, jus tibi non esse fundo tuo uti frui, nihil agitur, aliter atque si concedas mihi, jus tibi non esse in fundo tuo aquam quærere, minuendæ aquæ meæ gratia."—fr. 3. pr. D. 43. 20.—fr. 86. D. 50. 16. The principle stated in the text accounts for these two rules: I. It is immaterial whether a servitude is of any value or not to the original grantee *personally*. fr. 19. D. 8. 1. (Labeo) "Ei fundo, quem quis vendat, servitutem imponi, etsi non utilis sit, posse existimo: veluti, si aquam alicui ducere non expediret, nihilominus constitui ea servitus possit. Quædam enim habere possumus, quamvis ea *nobis* utilia non sunt."—*Hufeland*, Geist des R. R. Vol. 2. Div. 2. p. 88.—*Thibaut*, Civ. Abh. No. 3.—*Goldschmidt* in Löhr's Mag. Vol. 3. (1.) p. 480. 489.—Another interpretation of the passage quoted is given by *Gœdke* (in his Diss. An et quo sensu servitus non utilis fundo imponi possit? Rostock, 1826), and supported by *Zimmern* in the Tüb. krit. Z. für R. W. Vol. 2. p. 403.—II. A right granted to a man merely for his *personal* enjoyment or advantage in another's land, is not a servitus prædii. fr. 8. p. D. 8. 1. (Paulus) "Ut pomum decerpere liceat, et ut spatiari, et ut cœnare in alieno possimus, servitus (sc. prædii) imponi non potest."—*Thibaut*, Versuche. Vol. 1. No. 1.—*Schrader*, Civ. Abh. No. 6.—*Seuffert*, Erört. Div. 2. p. 39.

(*b*) fr. 20. § 1. D. 41. 1. (quoted above, § 288. note *b*.)—fr. 5. § 9. D. 39. 1.

(*c*) fr. 13. § 1. D. 8. 4. (Ulpianus) "Si constat, in tuo agro lapidicinas esse, invito te nec privato nec publico nomine quisquam lapides cædere potest, cui id faciendi jus non est; nisi talis consuetudo in illis lapidicinis consistat, ut si quis voluerit ex his cædere, non aliter hoc faciat nisi prius solitum solarium, pro hoc, domino præstet. Ita tamen lapides cædere debet, postquam satisfecit domino, ut neque usus necessarii lapidis intercludatur, neque commoditas rei, jure, domino adimatur."—const. 9. C. 3. 34. "Si in ædibus vicini tibi debita servitute parietem altius ædificavit Heraclius, novum opus suis sumtibus per præsidem provinciæ tollere compelletur. *Sed si te servitutem habuisse non probetur, tollendi altius ædificium vicino non est interdictum.*"

(*d*) fr. 20. § 5. D. 8. 2. (Paulus) "Stillicidium, quoquo modo acquisitum sit, *altius tolli potest*; *levior enim fit eo facto servitus*, quum, quod ex alto cadit, lenius, et interdum nec directum perveniat ad locum servientem; *inferius demitti non potest, quia fit gravior servitus*, id est pro stillicidio flumen. Ea de causa *retro quoque duci potest* stillicidium, quia in nostro magis incipiet cadere; *produci non potest*, ne alio loco cadat stillicidium, quam in quo imposita servitus est; lenius facere poterimus, acrius non. Et omnino sciendum est, *meliorem vicini conditionem fieri posse, deteriorem non posse*, nisi aliquid nominatim in servitute imponenda immutatum fuerit."—fr. 4. § 1. 2. D. 8. 1. (Papinianus) "*Modum adjici servitutibus posse constat*, veluti quo genere vehiculi agatur vel non agatur, vel ut equo duntaxat, vel ad certum pondus vehatur, vel ut grex ille traducatur, aut carbo portetur. § 2. Intervalla dierum et horarum non ad temporis causam, sed *ad modum pertinent jure constitutæ servitutis*."—fr. 5. § 1. D. ibid. (Gaius) "Usus servitutum temporibus secerni potest, forte ut quis *post*

the thing, or by one who has at least a *dominium utile* over it, as e. g. an *emphyteuta* or *superficiarius* (§ 317, 318).*

horam tertiam usque in horam decimam eo jure utatur, vel ut alternis diebus utatur."—fr. 24. D. 8. 2. (Paulus) "Cujus ædificium jure superius est, ei jus est in infinito supra suum ædificium imponere, *dum inferiora ædificia non graviore servitute oneret, quam pati debent.*"—fr. 24. fr. 33. § 1. D. 8. 3. (quoted above, p. 322. note *b*).

(*a*) fr. 2. D. 8. 1.—fr. 1. pr. D. 7. 4.—fr. 1. § 9. D. 43. 18. (Ulpianus) "Servitutes quoque

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* There are some defects in this section which it is necessary to supply. And first of all respecting the legal ground of servitudes. Do not servitudes conflict with our idea of the legal essence i. e. the indivisibility of ownership? They certainly do; for they make a division of the rights inherent in it. In a juridical point of view therefore, they can be justified only so far as their necessity or importance seems to require that the legislature should allow them. Many of the real (i. e. predial) servitudes are certainly necessary, or at least important, for the purpose of rendering rights of ownership perfectly available; and with respect to personal servitudes, the usufruct and use were contrived for enabling the owner to dispose separately of the substance of a thing, and of its enjoyment for a lifetime (*ad dies vitæ usufructuarii vel usuarii*); so that the owner, as he chooses, may grant the rights of ownership and the advantages of usufruct and use to different persons, or he may retain one of them for himself; and thus he has it in his power to secure to one incapable of ownership, the advantages of usufruct or use for his lifetime. It will be evident, that by this means the facilities for acquisition or alienation are increased without prejudice to ownership. (Comp. *Zachariä*, l. c.)

Considered from this point of view, the introduction of servitudes, merely as *private* restrictions of the absolute rights of the owner, must have appeared to the Romans as the most advisable means of protecting and increasing the use of one person's property by restricting that of another; for which purpose, in their high regard for the freedom of property, they were unwilling to resort to PUBLIC restrictions. They endeavoured rather to protect private property as much as possible against restrictions from political considerations, and to uphold and favour in their public law the *libertas rerum*, or free exercise of the owner's rights. Hence they very rarely restricted the owner for the sake of benefiting his neighbour, and seldom or never from a mere equitable consideration of the relations of neighbours to each other; yet they allowed certain restrictions for the purpose of favouring agriculture or preventing public damage (see § 286), and in a few cases on account of religious views (see p. 151. note *a*). But such general legal restrictions of property imposed by the public law, must not be confounded with servitudes, which from their character fall within the scope of the private law. (Comp. *Weber* zu Höpfner's Comm. 8th Ed. Frankfort, 1833. § 347.)

The Roman law distinguishes between *real* and *personal* servitudes. It is usually said that all servitudes are real (or predial), except four, which are personal: two of these latter still remain, viz. *ususfructus* and *usus;* and the two others, viz. *habitatio* and *operæ servorum*, are now obsolete. This classification, which has been retained by Mackeldey, as well as by most other civilians, may be defended by the consideration that real servitudes are *usually* granted to a piece of ground, and that those so-called personal servitudes are *necessarily* personal, i. e. they cannot be conferred upon a thing, but only upon a *person* during his lifetime; still, it is necessary to keep in view that the so-called real servitudes, although they are usually grants to a thing, and therefore in cases of doubt are presumed to be such, may yet very well have the nature of personal servitudes. Hence in real servitudes, the thing itself to which the servitude is granted is in a manner the entitled party; since the right of servitude forms an appurtenance to the thing entitled, and accordingly belongs to every possessor of it. Real servitudes (*servitutes reales*) therefore found a *lasting* relation of service between two estates, while personal servitudes become extinct with the life of the party entitled. The reason why those exclusively personal servitudes can never be granted to a thing is simply this, that a perpetual separation of the rights of use (*ususfructus, usus*, &c.) from the ownership would destroy the essence of the latter, and thus convert it into an empty name.

Consequently, the subject of a servitude, whether personal or real, may be either a

TITLE SECOND.

SINGLE KINDS OF SERVITUDES.

General Classification.

§ 296. With respect to the entitled subject, servitudes are: 1. Either *servitutes personarum s. hominum* (called *servitutes personales*),[a] i. e. such as are granted to some certain person merely for his own advantage,

prætorio jure constituentur, et ipsæ ad exemplum earum, quæ ipso jure constitutæ sunt, utilibus actionibus petentur; sed et interdictum de his utile competet."—Comp. *Thibaut*, System. 7th Ed. § 604. 621.

(*a*) fr. 1. 15. D. 3. 1.—fr. 8. § 3. D. 34. 3.

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person or a piece of land, which latter is of course represented by the possessor for the time being; the only exception is formed by the so-called personal servitudes, where only a person can be the subject or party entitled. The object of a servitude on the contrary can never be a person, but must always be a thing. The Romans recognised only *things* as objects of servitudes; and, naturally and consistently, they permitted these only as restrictions of another's *property*, and not of the proprietor's *person*; since personal obligations can arise only from a person's obligatory acts. In the main and excepting those restrictions of real freedom, property remained among them unrestricted, and the freedom of the person could by no means be affected through them. Hence their maxim: *Servitus in faciendo consistere nequit* (a servitude cannot impose on the owner of the servient ground a duty of *doing*). This principle, which forms a characteristic peculiarity of the Roman *servitudes* (and of every *jus in re aliena*), remains unaltered to the present day. Some writers on the German law, by whom the feudal and manorial burdens of the latter, e. g. tithes and personal services, have been erroneously regarded as servitudes, maintain that this maxim of the Romans was changed by the German law with respect to these burdens, and that in all other respects they are subject to the Roman principles of servitudes. But such is not the fact; for these burdens are perfectly distinct from servitudes in their nature, and there is nothing analogous to them in the Roman law. This error will best be made obvious by holding fast to the true idea of Roman servitudes, according to which they are nothing but single real rights which are detached from the ownership and belong to a third person. The real burdens on the contrary that occur in the German law, are by no means restrictions of the ownership. With respect to them it is not necessary that one estate should serve and another rule; for here the performance rests upon the person of the obligee, and is often due to the party entitled, without any reference to an estate; frequently too it belongs to the lord superior (*dominus directus*), contrary to the Roman principle "*Res propria nemini servit.*" Still they are by no means to be regarded in the light of obligations, but preserve a purely real character; on which account all possessory actions apply to them. Their nature consists essentially in this, that the "*possessor*" *of an estate* "*as such*" is obliged, for the advantage of the entitled party, to certain periodical performances, as e. g. to a yearly gift; wherefore the possessor is liable only in so far and so long as he possesses—and not for such portions of the estate as have passed into the possession of another, or for the arrears of his predecessors. The principle of the Roman law, it will be perceived, is much more natural: it by no means rests, as some have thought, on a subtility, but on a consistent carrying out of the notion of property. For since the freedom of ownership consists solely in the right to rule over the thing at pleasure, and to exclude all others from interfering with it (see above, §§ 294 and 285), restrictions can consistently be assumed only in these two respects, viz. in the non-exclusion of another from interference (*patiendo*), or in the owner's forbearance from acting as he pleases (*non faciendo s. omittendo*). Servitudes of the former kind, i. e. which entitle the holder to do something which the burthened party has to suffer (*in quibus dominus debet pati aliquid*), are called affirmative; and in contradistinction to them, those of the latter kind are termed negative, because they entitle the holder to require that the proprietor

so that they apply to his person alone, and are extinguished at his death.[a] 2. Or they are *servitutes prædiorum s. rerum* (called *servitutes reales*),[b] i. e. such as are established for the advantage of a piece of land. In this last case, the land itself is the entitled subject; and hence any one who possesses it can exercise the servitude.

I. Personal Servitudes.

§ 297. All personal servitudes have this peculiarity, that they are eminently personal rights; accordingly, they cannot be separated from the person of the entitled party,[c] and are extinguished at his death,[d]

(*a*) § 3. J. 2. 4. "*Finitur autem ususfructus morte fructuarii,* et duabus capitis deminutionibus, maxima et media, et non utendo per modum et tempus; quæ omnia nostra statuit constitutio. Item finitur ususfructus, si domino proprietatis ab usufructuario cedatur (nam extraneo cedendo nihil agit); vel ex contrario, si fructuarius proprietatem rei acquisierit, quæ res consolidatio appellatur. Eo amplius constat, si ædes incendio consumtæ fuerint, vel etiam terræ motu, aut vitio suo corruerint, extingui usumfructum, et ne aream quidem usumfructum deberi."—pr. J. 2. 5.—fr. 3. § 3. D. 7. 4. (Ulpianus) "*Morte quoque amitti usumfructum,* non recipit dubitationem, quum jus fruendi morte extinguatur, sicuti si quid aliud *personæ* cohæret."

(*b*) § 3. J. 2. 3.—fr. 1. § 1. D. 8. 4. (Ulpianus) "Ideo autem hæ servitutes prædiorum appellantur, quoniam sine prædiis constitui non possunt; nemo enim potest servitutem acquirere vel urbani, vel rustici prædii, nisi qui habet prædium." We now call them in opposition to personal servitudes, predial servitudes or easements to lands. The Romans termed the latter by way of distinction sometimes *servitutes* simply; as will be seen from the Rubrum, D. 8. 1. bearing the head: *de servitutibus;* and they used *jura* prædiorum in the meaning of *servitutes* prædiorum. Predial servitudes, as may be observed for the sake of elucidating their nature still more distinctly, will always pass over into personal servitudes, whenever they are conferred for a certain time or conditionally.—fr. 1. D. 8. 1. (Marcianus) "Servitutes aut personarum sunt, ut usus et ususfructus, aut rerum, ut servitutes rusticorum prædiorum et urbanorum."

(*c*) § 3. J. 2. 4. (quoted above, note *a*.)—fr. 66. D. 23. 3.—fr. 15. D. 10. 2.—fr. 37. D. 8. 3. (Paulus) "'Lucius Titius Caio Seio Fratri S. P. De aqua fluente in fontem, quem pater meus in Isthmo instruxit, do concedoque tibi gratuito digitum, sive ad domum, quam in Isthmo tenes, sive quocunque tandem volueris.' Quæro: an ex hac scriptura usus aquæ etiam ad heredes Caii Seii pertineat? Paulus respondit: usum aquæ personalem ad heredem Seii, quasi usuarii, transmitti non oportere"

(*d*) § 3. J. 2. 4. (see above, note *a*.)—pr. J. 2. 5.—fr. 3. § 3. D. 7. 4.—const. 3. C. 3. 33.—const. 12. C. ibid. "Ambiguitatem antiqui juris decidentes, sancimus, sive quis uxori suæ, sive alii cuicunque usumfructum reliquerit sub certo tempore, in quod vel filius ejus, vel quisquam alius pervenerit, stare usumfructum in annos singulos, in quos testator statuit: sive persona, de cujus ætate compositum est, ad eam pervenerit, sive non. Neque enim ad vitam homi-

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should abstain from doing something which he would otherwise be allowed to do (*quæ in non faciendo consistunt, s. in quibus dominus aliquid omittere debet*). Hereto we may add, that the principle, "Servitus in faciendo consistere nequit," is much more correctly expressed thus, "*Jus in re aliena* in faciendo consistere nequit;" for not only servitudes, but all other kinds of real rights are incapable of imposing a doing upon the owner of the burdened property: since every real right, in conformity with its nature as a detached portion of the ownership, can operate in the two above-mentioned respects only as a diminution of the rights of the proprietor.

Servitudes, according to the Roman law, are inseparable from the subject; so that only the exercise of them can be ceded to another. This essentially distinguishes servitudes from all other real rights.

The Roman law regards the right of servitude, as the real right to derive a certain *advantage* from another's property. The reason why it rejects such servitudes as secure no advantage to the entitled party, is, that it entertains too high a regard for the freedom of property, to subject it to unnecessary and useless restrictions.

unless they are granted to him expressly for himself and his heirs.[a] To these belong, according to the Roman law, the *usufruct* (*ususfructus*) and the *use* (*usus*) of a thing belonging to another, the right of *dwelling* in another's house (*habitatio*), and the *service of another's slave or beast* (*operæ servorum et animalium*).

A. Ususfructus.[*]

1. Definition.

§ 298. A *usufruct*[b] is that real right in another's property by virtue of which the party entitled is authorized to reap all the fruits of the

nis respexit, sed ad certa curricula, nisi ipsi, cui usufructus legatus sit, ab hac luce fuerit subtractus; tunc etenim ad posteritatem ejus usumfructum transmitti non est possibile, *quum morte usumfructum penitus extingui, juris indubitati sit.*" — const. 14. C. ibid.— "Antiquitas dubitabat, si quis fundum vel aliam rem cuidam testamento relinqueret, quatenus ususfructus apud heredem maneret, si hujusmodi constaret legatum. Et quidam inutile legatum esse existimabant, quia ususfructus nunquam ad suam rediret proprietatem, sed semper apud heredem remaneret. Et forsitan hoc existimabant, quia et secundus heres et deinceps successores unius esse videantur nec possit hujusmodi ususfructus secundum veterem distinctionem solitis modis extingui. Alii autem hujusmodi legatum non esse respuendum existimaverunt. Tales altercationes decidentes sancimus, et hujusmodi legatum firmum esse, et *talem usumfructum una cum herede finiri et, illo moriente vel aliis legitimis modis eum amittente, expirare.* Quare enim iste ususfructus sibi talo vindicet privilegium, ut a generali interemtione ususfructus ipse solus excipiatur? quod ex nulla induci rationabili sententia manifestissimum est. Et propter hoc, et usumfructum finiri, et ad proprietatem suam redire, et utile esse legatum sancientes, hujusmodi paucissimis verbis totam eorum ambiguitatem delevimus." (Lampadio et Oreste Coss. 530.)

(*a*) Still even in this case the servitude becomes extinct with the death of the entitled party, and only commences anew in the person of his heir. fr. 3. § 12. D. 45. 1.

(*b*) Inst. 2. 4.—Dig. 7. 1.—Cod. 3. 33.—*Pauli* sent. rec. III. 6. § 17–26.—Fragmenta Vaticana tit. de usufructu. On the whole of this doctrine, see: *Noodt* de usufructu; in his Works. Vol. 1.—*Galvanus* de usufructu. Geneva, 1676. Tubingen, 1788.—*Donelli* Comm. jur. civ. Lib. 10.

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[*] *Ususfructus* consists, as appears from the composition of the word, of *use* and *fruition*. The difference between *ususfructus* and *usus* lies chiefly in the extent of the rights residing in them. The *usufructuary* has a perfect right of use and enjoyment in a thing belonging to another, in the manner of a dominus; while the *usuary*, as a general rule, has only the right of use, and where the law allows him by way of exception a fruition, this is confined to narrow limits.

The usufructuary, who has the full enjoyment of the principal thing and of all its appurtenances, can use them himself and enjoy their natural fruits or reap their civil fruits (as farm-rents, &c.); for he is entitled to let the premises, to sell the fruits, and even to sell or give away the entire exercise of the usufruct. The ususfructus on a farm e. g. extends also to the implements of husbandry (*instrumentum fundi*), the servitudes belonging to the land, &c. The usufructuary acquires the property of the produce of the soil by perception (§ 154), and of the young of animals by the mere separation from the dam. He can also reap the fruits before they are perfectly ripe. fr. 42. D. 33. 3.

As it is his duty to preserve the substance of the thing undiminished, he is to make use of the cattle, fish-ponds, dove-cotes, &c. belonging to the estate, only on economical principles, that is to say, with constant attention to keeping up the supply. fr. 70. § 2. D. 7. 1.—fr. 62. § 1. fr. 68. § 2. fr. 69. D. ibid. For the same reason he is not allowed to change the form or destination of the thing, even when it would gain thereby; and in this respect he is still more restricted in the usufruct of moveable things and buildings than with regard to lands. As respects the latter, he must not change the destination of the single objects, e. g. he must not turn a field into a

thing, and in general to have the whole use and enjoyment of the thing as far as is practicable without injury to its substance.[a] The party thus entitled is called the *fructuarius* or *usufructuarius*, in contradistinc-

(*a*) pr. J. 2. 4.—fr. 1. D. 7. 1. (Paulus) "Ususfructus est jus *alienis* rebus utendi fruendi, salva rerum substantia." The usus-fructus, i. e. the jus utendi fruendi re *aliena*, must therefore not be confounded with the owner's right of using and enjoying his property. Those later jurists who invented and attempted to introduce the term "ususfructus causalis s. conjunctus," to denote thereby the owner's right of use and enjoyment, deserve

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meadow, or a pleasure-ground into an orchard; though he may increase its productiveness by making new establishments, such as opening stone-quarries, coal-pits, mines of metal, &c., provided the soil required for tillage remains undiminished. fr 13. § 4. 6. pr. 15. § 1. D. 7. 1.—*Glück*, Comm. Vol. 9. p 248. The fructuary may alienate or mortgage the exercise of his right, but not the right itself; whence it is evident that the mortgagee can repay himself only by selling the fruits, and, if required, by procuring a sale of the whole exercise of the usufruct. As regards the giving of security, the proprietor can enforce it by retaining the thing; or he can obtain it when the usufructuary is in possession of it, by means of the *condictio incerti*; or if he chooses, he may vindicate the thing until security is given. A remission of the security by last will has no effect. const. 7. C. 6. 54. "Ut boni viri arbitratu is cui ususfructus relictus est, utatur fruatur, minime satisdationem remitti posse." This absurd decision which, having once been made is retained in practice, has given much trouble to commentators, who have been unable to find any good reason to justify it. As the security (which is given to ensure the eventual restoration of the thing, and its prudent use in the meantime) can be remitted by agreement, and as one may give away his property itself by testament, it seems incomprehensible that in granting a usufruct he should not be allowed to remit the security. "Suppose for instance," says *Höpfner* (Comm. § 375), "that one should appoint his brothers and sisters his heirs, and bequeath to his widow the usufruct of the whole property during her lifetime. Why shall he not be permitted to exempt her from the necessity of giving security? He might exclude his brothers and sisters altogether, and yet he cannot order them not to demand security from his widow!" *Thibaut* (Braun's Erörterungen. § 619.) calls this decision of the Codex prohibiting the remission of security, a strangely despotic decree. The only reasonable explanation of it seems to be, that the Roman law, which every where endeavours to the utmost to protect ownership against *servitudes*, was led to the decision by a consideration of the fact that the right of usufruct is the most comprehensive servitude, and hence must not be favoured. Still these notions being carried out so rigorously, cannot but give rise as in the present case to absurdity and hardship, inasmuch as the law renders it impossible for the testator in devising a usufruct to give proof of his confidence in the usufructuary. In Austria, as *Theser* remarks (Die Fruchtniessung nach röm. u. östreich. Recht. Vienna, 1839. p. 58 seq.), this decree of the Codex has been overruled in practice; and § 520 of the Civil Code of that country gives in general a right to require security for the substance only in case of manifest danger. According to the Roman law, this security is given by sureties, or where its object is certain by pledges. fr. 13 pr. D. 7. 1.—fr. 5. § 1. fr. 7. pr. D. 7 9. In case no such security can be given, it is left to the court to decide whether a promise under oath shall suffice, or whether the *res fructuaria* must be sequestered or let out. Moreover, according to the Roman law, the father is released from giving security with respect to his usufruct in the *bona adventitia* of his children; as are also the fiscus (state treasury), city corporations, and any one to whom the property will certainly descend; moreover in practice, a clergyman is exempt with respect to his glebe, and likewise the donor who has reserved the usufruct to himself. *Glück*, Comm. Vol. 9. p. 484.

As regards particularly the fruits of the concluding year, all the young of animals brought forth before the expiration of the year belong to the usufructuary, even though he has not taken possession of them: the produce of the soil, on the contrary, belong to him only in so far as he has acquired them by perception; since those that are yet standing or are merely separated, as well as those that have fallen off, belong to the

tion to the proprietor of the thing; while the latter, who in such case merely retains the *nuda proprietas* (§ 260),[a] is termed *proprietarius s. dominus proprietatis*; and the thing itself, *res fructuaria*.

2. Its Object.

§ 299. A usufruct may be granted in any moveable or immoveable thing, though it properly supposes that the thing should be corporeal and inconsumable; since the usufruct conveys no right to the substance of the thing, and consequently none to the consumption of it.[b] And so it was according to the old Roman law; but in later times, when the right of usufruct was analogously extended to incorporeal and consumable things, a distinction arose between *verus* and *quasi-ususfructus*,[c] and a usufruct was allowed either in the whole or a part of an estate (*ususfructus omnium vel partis bonorum*). A usufruct of the latter description embraces all the single component parts of the estate that remain after the debts are deducted from it; and these come

ittle credit; for the Romans never gave it the name of ususfructus.— Comp. also the passages quoted above, § 295. note *a*.

(*a*) § 1. J. 2. 4. A usufruct, according to its nature, admits of division in many respects, as Dr. Rosshirt adds; for example, where a usufruct has been granted by the year, or perhaps *alternis annis*, the usufruct of each year constitutes a separate right. fr. 13. D. 33. 2.—fr. 28. D. 7. 4.—*Rosshirt*, Vermächtnisse. Vol. 2. p. 185.

(*b*) pr. § 1. J. 2. 4.—fr. 2. D. 7. 1. (Celsus) "Est enim ususfructus jus in corpore, quo sublato et ipsum tolli necesse est."

(*c*) § 2. J. 2. 4. — Dig. 7. 5. — *Majansius*, Disputt. Vol. 1. No. 17.—*Puchta* in the Rhein. Mus. Vol. 3. p. 82.—See also below, § 302. and *Thibaut*, Syst. 7th Ed. § 610.

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proprietor. Of the *fructus civiles* there belongs to the usufructuary the rent *pro rata temporis* of things used constantly (as e. g. a ship or a house); while with regard to others (as e. g. fields and meadows) which are used only at certain times, the whole income belongs to him only where he has gathered all the fruits before the expiration of the usufruct.

The usufructuary has to pay the public taxes and imposts for which the thing is liable, to make the necessary repairs, and at the expiration of his right (*finito usufructu*) to restore the thing *in specie* and in good condition. The proprietor of the thing, it need scarcely be added, is entitled at any time to alienate or mortgage the thing without the usufructuary's consent, since this does not impair the usufruct.

As respects the *quasi-ususfructus*, this is always a relation merely analogous to the proper usufruct; for here, contrary to the nature of the usufruct, the usufructuary acquires the ownership of the thing, since he has to restore it not *in specie* but only *in genere*. There is consequently a great similarity between this and a loan (*mutuum*), where the borrower has to make restoration only in *eodem genere*, in like quantity and quality. The *ususfructus nominum* is a verus ususfructus, when there is granted to the usufructuary only the enjoyment of the interest of a certain capital; and a quasi-ususfructus, when he is allowed to dispose of the capital, so that he can collect it, loan it out, and make such use of it as he pleases. The entire controversy as to whether the *ususfructus vestimentorum* is a true or improper usufruct, falls to the ground, when all is made to depend simply on whether the garments are to be restored *in specie* or *in genere*. The security to be furnished in the case of a quasi-usufruct (*cautio quasi-usufructuaria*) relates to the restitution of the same quantity and quality or its worth in money; it is called *senatoria* or *civilis*, in contradistinction to the prætoria in the true usufruct, because it was introduced by a Sctum, probably the *Tiberianum*; though *Hugo* (Gesch. d. R. R. Vol. 2d p. 764 seq.) thinks it more likely that this anonymous Sctum was made as early as in the time of Augustus.

within the scope of a *verus ususfructus* as far as the corporeal and inconsumable things belonging to the estate are concerned, and within that of a *quasi-ususfructus* with respect to all its other constituent parts.[a]

3. Rights and Duties of the Usufructuary.

A. Rights.

§ 300. In a case of *verus ususfructus*, the usufructuary has the following *rights:* 1. He may fully use and enjoy the thing belonging to another, as far as this can be done according to the form and fashion of it, without injury to its substance; and he is not limited in the use of it to his personal necessities.[b] Accordingly he has the right to reap all fruits still ungathered (*fructus pendentes*) at the time when the usufruct commences,[c] and all those produced during its continuance;[d] but he does not become the owner of the fruits until he has reaped them,

(*a*) fr. 24. pr. D. 33. 2.—fr. 37. D. ibid. (Scævola) "*Uxori meæ usumfructum lego bonorum meorum, usque dum filia mea annos impleat octodecim.* Quæsitum est: an prædiorum, tam rusticorum quam urbanorum et mancipiorum, et supellectilis, itemque kalendarii ususfructus ad uxorem pertineat? Respondi: secundum ea, quæ proponerentur, omnium pertinere."—fr. 43. D. ibid. (Venuleius) "Nihil interest, utrum bonorum quis, an *rerum tertiæ partis usumfructum* legaverit. Nam si *bonorum* ususfructus legabitur, et *æs alienum ex bonis deducetur*, et quod in actionibus erit, computabitur. At si certarum rerum ususfructus legatus erit, non idem observabitur."—fr. 39. § 1. D. 50. 16. (Paulus) "Bona intelliguntur cujusque, quæ *deducto ære alieno* supersunt."—const. 1. C. 3. 33.

(*b*) The Roman law settles in its decisions a great many particulars concerning it, as will be seen from the following passages. fr. 9. § 7. D. 7. 1. (Ulpianus) "Instrumenti autem fructum habere debet, vendendi tamen facultatem non habet. Nam et si fundi ususfructus fuerit legatus, et sit ager, unde palo in fundum, cujus ususfructus legatus est, solebat paterfamilias uti, vel salice, vel arundine, puto fructuarium hactenus uti posse, ne ex eo vendat, nisi forte salicti ei, vel silvæ palaris, vel arundineti ususfructus sit legatus; tunc enim et vendere potest. Nam et Trebatius scribit: silvam cæduam et arundinetum posse fructuarium cædere, sicut paterfamilias cædebat, et vendere, licet paterfamilias non solebat vendere, sed ipse uti. Ad modum enim referendum est, non ad qualitatem utendi."—fr. 10. D. ibid. (Pomponius) "Ex silva cædua pedamenta et ramos ex arbore usufructuarium sumturum, ex non cædua in vineam sumturum, dum ne fundum deteriorem faciat."—fr. 12. pr. D. ibid. (Ulpianus) "Arboribus evulsis vel vi ventorum dejectis, *usque ad usum suum et villæ* posse usufructuarium ferre, Labeo ait, nec materia eum pro ligno usurum, si habeat, unde utatur ligno. Quam sententiam puto veram; alioquin et si totus ager sit hunc casum passus, omnes arbores auferret fructuarius. Materiam tamen ipsum succidere, *quantum ad villæ refectionem* satis sit, putat posse, quemadmodum calcem, inquit, coquere, vel arenam fodere, aliudve quid ædificio necessarium sumere."—fr. 13. § 5. D. ibid. (Idem) "Inde est quæsitum: an lapidicinas, vel cretifodinas, vel arenifodinas ipse instituere possit? Et ego puto, *etiam ipsum instituere posse*, si non agro partem necessariam huic rei occupaturus est. Proinde venas quoque lapidicinarum et hujusmodi metallorum *inquirere poterit*; ergo et auri, et argenti, et sulphuris, et æris, et ferri, et ceterorum fodinas, vel quas paterfamilias instituit, *exercere poterit, vel ipse instituere, si nihil agriculturæ nocebit.* Et si forte in hoc, quod instituit, plus reditus sit, quam in vineis, vel arbustis, vel olivetis, quæ fuerunt, forsitan etiam hæc dejicere poterit; siquidem ei permittitur meliorare proprietatem."—fr. 18. D. ibid. (Paulus) "Agri usufructu legato, *in locum demortuarum arborum aliæ substituendæ sunt, et priores ad fructuarium pertinent.*"—Comp. also § 37. J. 2. 1.—Concerning the fr. 13. § 5. just cited, see: *Feuerbach*, Civ. Versuche. Vol. 1. No. 4.—*Hagemeister* in Hugo's Civ. Mag. Vol. 3. No. 13.—*Thibaut*, Civ. Abh. p. 269, note 7. and *Madai* in the Archiv Civ. Prax. Vol. 15. p. 330.

(*c*) fr. 27. pr. D. 7. 1. (Ulpianus) "Si pendentes fructus jam maturos reliquisset testator, fructuarius eos feret, si die legati cedente adhuc pendentes deprehenderit; nam extantes fructus ad fructuarium pertinent."

(*d*) fr. 59. § 1. ibid. (Paulus) "*Quidquid in fundo nascitur, vel quidquid inde percipitur, ad fructuarium pertinet; pensiones quoque jam antea locatorum agrorum, si ipsæ quoque specialiter comprehensæ sint.* Sed et ad exemplum venditionis, nisi fuerint specialiter exceptæ, potest usufructuarius conductorem repellere."—fr. 25. § 1. D. 22. 1.—See above, § 154.

and consequently all fruits not reaped by him at the termination of the usufruct fall not to his heirs but to the proprietor.[a] 2. He has, moreover, the right to exercise all the servitudes attached to the thing.[b] 3. He may transfer the exercise of his usufruct to another, either for recompense or gratuitously;[c] but he cannot transfer to another the right of usufruct itself, as that is inseparable from his person, though he is of course at liberty to return it to the proprietor.[d]

B. Duties.

§ 301. The duties of the usufructuary are these: 1. He must bear all the burdens and taxes to which the thing is subject.[e] 2. He must use

(*a*) § 36. J. 2. 1.—fr. 13. D. 7. 4. (Paulus) "Si usufructuarius messem fecit, et decessit, '*stipulam, quæ demessa jacet, heredis ejus esse Labeo ait, spicam autem, quæ terra teneatur, domini fundi esse, fructumque percipi spica aut fœno cæso aut uva ademta, aut excussa olea*,' quamvis nondum tritum frumentum, aut oleum factum, vel vindemia coacta sit.' Sed ut verum est, quod de olea excussa scripsit, ita aliter observandum de ea olea, quæ per se deciderit. Julianus ait: *fructuarii fructus tunc fieri, quum eos perceperit*; bonæ fidei autem possessoris, mox quam a solo separati sint."—fr. 12. § 6. D. 7. 1.—fr. 25. § 1. D. 22. 1.—fr. 8. D. 33. 1.—See also above, § 154. note *c*. and more particularly § 284.—Of fructus civiles fr. 58. pr. D. 7. 1. speaks as follows. (Scævola) "Defuncta fructuaria mense Decembri, *jam omnibus fructibus qui in his agris nascerentur, mense Octobri per colonos sublatis*, quæsitum est: utrum pensio heredi fructuariæ solvi deberet? quamvis fructuaria ante Kalendas Martias, quibus pensiones inferri debebant, decesserit; an dividi debeat inter heredem fructuariæ, et rempublicam cui proprietas legata est? Respondi: rempublicam quidem cum colono nullam actionem habere, fructuariæ vero heredem sua die secundum ea, quæ proponerentur, *integram pensionem percepturum*."

(*b*) fr. 1. pr. fr. 5. § 1. D. 7. 6. and comp. with it fr. 1. § 20. fr. 2. D. 39. 1.—fr. 1. § 4. D. 43. 25. and see thereon, *Bülow*, Abh. Vol. 2. No. 4.

(*c*) fr. 12. § 2. D. 7. 1.—fr. 38. D. 7. 1. (Marcianus) "*Non utitur usufructuarius, si nec ipse utatur, nec nomine ejus alius*. puta qui emit, vel qui conduxit, vel cui donatus est, vel qui negotium ejus gerit. Plane illud interest, quod, si vendidero usumfructum, *etiamsi emtor non utatur, videor usumfructum retinere*."—fr. 39. D. ibid. (Gaius) "Quia qui pretio fruitur, non minus habere intelligitur, quam qui principali re utitur fruitur."—See also fr. 67. D. ibid.—const. 13. C. 3. 33.—A usufruct can also be mortgaged. fr. 11. § 2. D. 20. 1. (Marcianus) "Usufructus an possit pignori hypothecæve dari, quæsitum est; sive dominus proprietatis convenit, sive ille, qui solum usumfructum habet. Et scribit Papinianus libro undecimo Responsorum: tuendum creditorem; et si velit cum creditore proprietarius agere: *non esse ei jus uti frui invito se*, tali exceptione eum Prætor tuebitur: si non inter creditorem, et eum, ad quem usufructus pertinet, convenerit, ut usufructus pignori sit. Nam quum et emtorem usufructus tuetur Prætor, cur non et creditorem tuebitur? Eadem ratione et debitori objicitur exceptio."

(*d*) *Pauli* sent. rec. III. 6. § 32.—*Gaius*, II. 30. "Usufructus in jure cessionem tantum recipit. Nam dominus proprietatis alii usumfructum in jure cedere potest, ut ille usumfructum habeat et ipse nudam proprietatem retineat. Ipse usufructuarius in jure cedendo domino proprietatis usumfructum, efficit, ut a se discedat et convertatur in proprietatem: alii vero in jure cedendo nihilominus jus suum retinet; creditur enim, ea cessione nihil agi."—§ 3. J. 2. 4.—*Theophilus* ad h. l. and the Turin gloss to the same passage (in Savigny's R. R. im M. A. Vol. 3. p. 681). According to Gaius and the passage above cited in the Institutes, a cession of a usufruct to a third party is ineffectual and void, yet does not prejudice the cedent, as may be seen particularly from the passage in Gaius ("jus suum retinet"). This is not contradicted by fr. 66. D. 23. 3. although it is there said: "Sed ad dominum proprietatis reversurum usumfructum;" for that is not to be taken absolutely, but is to be understood only of the particular case there referred to. Comp. *Walch*, Introd. in controvers. jur. civ. Ed. 3. p. 159.—*Siertsema* de effectu cessionis usufructus factæ extraneo. Groningen, 1807.—*Glück*, Comm. Vol. 9. p. 223 seqq. — *Goldschmidt* in Löhr's Mag. Vol. 3. p. 478.—*Puggé* in the Rhein. Mus. Vol. 1. p. 145.—*Puchta* in Schunck's Jahrb. Vol. 4. p. 144.—*Daniels* in Rosshirt's Z. Vol. 2. No. 1.—*Löhr* in the Z. für Civ. R. u. Proc. Vol. 13. No. 2. Concerning the case where the proprietor, as a *delegatus* of the usufructuary, cedes the usufruct to a third person, see fr. 4. D. 46. 2. and *Glück*, Comm. Vol. 9. pp. 222 and 232.—*Thibaut*, System. § 611.

(*e*) fr. 10. D. 50. 17. (Paulus) "Secundum naturam est. *commoda* cujusque rei eum sequi, quem sequuntur *incommoda*."—fr. 7. § 2.

the thing like a prudent father of a family (*bonus paterfamilias*), and as such he must see that it is kept in good condition; otherwise he will become liable to the proprietor for damages.[a] But if the taxes, repairs, and other costs of maintenance, prove too heavy for him, he can release himself by abandoning the usufruct.[b] 3. At the termination of his right, he must restore the thing itself to the proprietor. 4. And lastly, in order to secure the performance of all his duties, he must give to the proprietor at the commencement of his usufruct a surety or pledge, called *cautio usufructuaria*.[c] Until this security is furnished, the usufructuary cannot claim possession of the thing; and in case he has already obtained possession, the proprietor may bring an action to compel him to furnish such security.[d]

D. 7. 1. (Ulpianus) "Quoniam igitur omnis fructus rei ad eum pertinet, reficere quoque eum ædes per arbitrum cogi, Celsus scribit libro octavo decimo Digestorum, hactenus tamen, ut sarta tecta habeat; si qua tamen vetustate corruissent, neutrum cogi reficere, sed si heres reficeret, passurum fructuarium uti. Unde Celsus de modo sarta tecta habendi quærit, si, quæ vetustate corruerunt, reficere non cogatur. Modica igitur refectio ad eum pertinet, *quoniam et alia onera agnoscit*, usufructu legato, ut puta stipendium, vel tributum, vel solarium, vel alimenta ab ea re relicta. Et ita Marcellus libro decimo tertio scribit."—fr. 27. § 3. D. ibid. (Idem) "Si quid cloacarii nomine debeatur, vel si quid ob formam aquæductus, qui per agrum transit, pendatur, *ad onus fructuarii pertinebit*. Sed et si quid at collationem viæ, puto *hoc quoque fructuarium subiturum*. Ergo et quod ob transitum exercitus confertur ex fructibus; sed et si quid municipio debetur; nam solent possessores certam partem fructuum municipio viliore pretio addicere, solent et fisco functiones præstare; *hæc onera ad fructuarium pertinebunt*."—fr. 52. D. 7. 1.

(*a*) fr. 1. § 3. D. 7. 9. (Idem) "Cavere autem debet, *viri boni arbitratu perceptum iri usumfructum*, hoc est, non deteriorem se causam ususfructus facturum, *ceteraque facturum, quæ in re sua faceret*."—fr. 1. § 7. fr. 2 D. ibid.—fr. 9. pr. D. 7. 1. (Idem) "Item si fundi ususfructus sit legatus, quidquid in fundo nascitur, quidquid inde percipi potest, ipsius fructuarii est, *sic tamen, ut boni viri arbitratu fruatur*. Nam et Celsus libro decimo octavo Digestorum scribit: cogi eum posse recte colere." fr. 13. § 2. D. ibid.—fr. 15. § 3. D. ibid. (Idem) "Et generaliter Labeo ait: in omnibus rebus mobilibus modum eum tenere debere, *ne sua feritate vel sævitia ea corrumpat*, alioquin etiam lege Aquilia eum conveniri."—fr. 65. pr. D. 7. 1. (Pomponius) "Sed quum fructuarius debeat, quod suo suorumque facto deterius factum sit, reficere, non est absolvendus, licet usumfructum derelinquere paratus sit. *Debet enim omne quod diligens paterfamilias in sua domo facit, et ipse facere*."—fr. 66. D. ibid. —§ 38. J. 2. 1. "Sed si gregis usumfructum quis habeat, in locum demortuorum capitum ex fœtu fructuarius submittere debet (ut Juliano visum est), et in vinearum demortuarum vel arborum locum alias debet substituere; *recte enim colere et quasi bonus paterfamilias uti debet*."—But he is not responsible for its deterioration by ordinary use. fr. 9. § 3. D. 7. 9.—*Castendyk*, Diss. de juribus et obligationibus usufructuarii circa refectionem ædificiorum. Gottingen, 1792.

(*b*) fr. 48. pr. D. 7. 1. (Paulus) "Si absente fructuario heres, quasi negotium ejus gerens, reficiat, negotiorum gestorum actionem adversus fructuarium habet, tametsi sibi in futurum heres prospiceret *Sed si paratus sit recedere ab usufructu fructuarius, non est cogendus reficere*, sed actione negotiorum gestorum liberatur."—fr. 64. D. ibid. (Ulpianus) "*Cum fructuarius paratus est usumfructum derelinquere, non est cogendus domum reficere*, in quibus casibus et usufructuario hoc onus incumbit. Sed et *post* acceptum contra eum judicium, *parato fructuario* derelinquere usumfructum, dicendum est, absolvi eum debere a judice."—fr. 65 pr. D. ibid. (quoted above, note *a*.)—*Von Der Becke*, Observationes de juribus et obligationibus usufructuarii usumfructum derelinquentis. Leipsic, 1825.

(*c*) Dig. 7. 9.—*Galvanus* de usufructu. cap. 19. 20.—By way of analogy, the usuarius is also required to give security. *Thibaut*, System. § 764. The grantor can remit the security, except in the case where the usufruct is created by testament. — const. 1. C. 3. 33. — const. 7. C. 6. 54. "Scire debetis, fideicommissi quidem et legati satisdationem remitti posse, Divum Marcum et Divum Commodum constituisse. Ut autem boni viri arbitratu is, cui ususfructus relictus est, utatur fruatur, *minime satisdationem remitti testamento posse*."—Comp. fr. 8. D. 7. 9. On the various opinions see: *Höpfner*, Comm. § 373.—*Glück*, Comm. Vol. 9. § 654.—*Hofstede* de cautione usufructuaria a testatore non remittenda. Groningen, 1804.—*Rosshirt*, Vermächtnisse. II. p. 181 seqq. See the Editor's note to § 298.

(*d*) fr. 13. pr. D. 7. 1.—fr. 7. pr. D. 7. 9.

4. Rights and Duties of the Quasi-usufructuary.[a]

§ 302. In a *quasi-usufructus*, to which the *usufructus quantitatis* especially belongs, the usufructuary becomes in fact proprietor of the *res fructuaria*; since he thereby acquires a right to consume it, i. e. to dispose even of the substance of the thing. But at the termination of his right, he must restore a like quantity to that which he received, either *in natura* by giving things of the same kind and quality, or in money by paying their value; for the performance of which duty security must also be given, as above.[b] As regards the usufruct in wearing apparel, it is in case of doubt to be taken as a *verus usufructus*, when it has not been expressly granted as a *usufructus quantitatis*.[c] As to the *usufructus pecuniæ s. nominis*, the grant by which it has been conferred can alone decide whether it is a *verus* or a *quasi-usufructus*; since no special principle has been laid down respecting it.[d]

B. Usus.

§ 303. The *right of use* (*usus*)[e] is that personal servitude by virtue of which the party entitled, without respect to the wants of himself or family, may make every use of a thing belonging to another which its nature and character admit of. Consequently the *usus* in itself conveys no right to the *fruits*, but only to the *use* of the thing; when, however, this is of such a nature that it cannot be used at all, or at least not completely, without the enjoyment of the fruits, the usuary is entitled to a moderate share in the fruits according to his wants.[f] Moreover,

(*a*) § 2. i. fin. J. 2. 4. "Senatus non fecit quidem earum rerum (si quæ ipso jure consumuntur) usumfructum—nec enim poterat—sed 'per cautionem' quasi usumfructum constituit." Hence in the case of a quasi-usufructus, security was most essential. fr. 3. pr. fr. 4. § 2. D. 7. 5.—*Schilling*, Inst. § 191.

(*b*) fr. 7. D. 7. 5. and comp. § 2. J. 2. 4.—fr. 5. § 1. D. 7. 5—*Schweppe*, Röm. Priv. R. Vol. 2. § 298–300.

(*c*) fr. 15. § 4. D. 7. 1.—§ 2. J. 2. 4. and the gloss to the same.—fr. 9. § 3. D. 7. 9.—*Donellus*, Comm. X. 4.—*Noodt* de usufr. Lib. I. c. 21.—*Schöman*, Handb. des Civ. R. Vol. 1. p. 15.—*Mühlenbruch*, Doctr. Pand. § 289. A great many adhere to the very opposite opinion, e. g. *A. F. Schott* de usufr. vestimentorum; in Opusc. jur. Leipsic, 1770. p. 164.—*Thibaut*, System. § 610.—See in general, *Wilhelm* de usufructu vestimentorum. Groningen, 1801. and *Glück*, Comm. Vol. 9. § 643. 644.

(*d*) fr. 3. 4. D. 7. 5.—const. 1. C. 3. 33.—*Lochner*, Diss. de usufructu pecuniæ. Erlangen, 1783.—*Weber* zu *Höpfner*. § 374. Note 2.—*Mühlenbruch*, Cession. 3d edition. p. 497.

(*e*) Inst. 2. 5.—Dig. 7. 8.—33. 3.—*Thibaut*, Versuche. Vol. 1. No. 3.—*Weber* zu Höpfner. § 380.—*Savigny*, Beruf unserer Zeit zur Gesetzgebung. p. 101.—*Rosshirt*, Vermächtnisse. Vol. 2. p. 187 seqq.

(*f*) The following passages will explain the nature of usus: fr. 2. pr. D. 7. 8. (Ulpianus) "Cui usus relictus est, *uti potest, frui non potest.* Et de singulis videndum." After this introductory statement, the title is occupied with passages particularizing the rights of the usuarius, and furnishing examples of their application to houses, villas, cattle, &c. Thus for instance it is said in fr. 12. § 2. D. ibid. (Idem) "Sed si pecoris ei usus relictus est, puta gregis ovilis, ad stercorandum usurum duntaxat, Labeo ait: sed neque lana, neque agnis, neque lacte usurum; *hæc enim magis in fructu esse.* Hoc amplius etiam modico lacte usurum puto: neque enim tam stricte interpretandæ sunt voluntates defunctorum. § 3. Sed si bovum armenti usus relinquatur, *omnem usum habebit, et ad arandum et ad cetera, ad quæ boves apti sunt.*" Under certain suppositions, however, the usus contains as many rights as the ususfructus. This may be seen from the following passage. fr. 22. pr. D. ibid. (Pomponius) "Divus Hadrianus,

he cannot transfer the exercise of his right, at least not wholly and exclusively, to another.[a]

C. *Habitatio.**

§ 304. The *right of dwelling*[b] (*habitatio*), or the right of free residence in another's house, was among the Romans substantially the same as the *ususfructus* or *usus ædium*;[c] and the *habitatio*, or *usus ædium habitanda causa*, seems to have been employed only in cases where a residence was granted to a poor person out of charity.[d] Hence the *habitator* could transfer the exercise of his right to another for a compensation, but not gratuitously;[e] and hence too the *habitatio*, when granted as a pure *donatio inter vivos*, could not be revoked by the donor's heirs.[f]

D. *Operæ Servorum.*

§ 305. The *operæ servorum et animalium* consisted among the Romans in the right to enjoy every use and advantage from the services of

quum quibusdam usus silvæ legatus esset, statuit, *fructum* quoque eis legatum videri, *quia nisi liceret* legatariis cædere silvam et vendere quemadmodum usufructuariis licet, *nihil habituri essent* ex eo legato."

(*a*) § 1. J. 2. 5.—fr. 2. § 1. D. 7. 8. (Ulpianus) "Domus usus relictus est aut marito, aut mulieri, si marito, potest illic habitare non solus, verum cum familia quoque sua. An et cum libertis? fuit quæstionis. Et Celsus scripsit: et cum libertis; posse hospitem quoque recipere. Nam ita libro octavo decimo Digestorum scripsit. Quam sententiam et Tubero probat. Sed an etiam inquilinum recipere possit? apud Labeonem memini tractatum libris Posteriorum. Et ait Labeo: *eum, qui ipse habitat, inquilinum posse recipere; item, et hospitem, et libertos suos.*"—fr. 3. (Paulus) "*Et clientes.*"—fr. 4. pr. D. ibid. (Ulpianus) "Ceterum sine eo ne hos quidem habitare posse. Proculus autem de inquilino notat, non belle inquilinum dici, qui cum eo habitet. Secundum hæc et si pensionem habitationis percipiat, dum ipse quoque inhabitat, non erit ei invidendum, quid enim, si tam spatiosæ domus usus sit relictus homini mediocri, ut portiuncula contentus sit? Sed et cum his, quos loco servorum in operis habet, habitabit, licet liberi sint, vel servi alieni."—fr. 8. pr. D. 7. 8. (Idem) "Sed neque *locabunt scorsum*, neque concedent habitationem *sine se, nec vendent usum.*"

(*b*) Inst. 2. 5.—Dig. 7. 8.—Cod. 3. 33.

(*c*) fr. 10. pr. D. 7. 8.

(*d*) *Thibaut*, Abh. No. 2.—Contra: *Hugo*, R. G. p. 508.—See also *Savigny's* Z. Vol. 4. p. 46.—*Buchholtz*, Vers. No. 15.—*Rosshirt*, Vermächtnisse. Vol. 2. p. 196 seqq.

(*e*) § 5. J. 2. 5.—const. 13. C. 3. 33.—fr. 10. pr. D. 7. 8.

(*f*) fr. 27. 32. D. 39. 5.—*Buchholtz*, Vers. No. 15, advances a different opinion.

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* *Habitatio*, as established by Justinian, is distinguished both from ususfructus and usus, by the fact that it does not expire by non-user; and in particular from *ususfructus* (*ædium*), by reason that it relates to dwellings alone and cannot be used by the habitator for any other purpose, while a usufructuary may use the house as a storehouse, an inn, &c.; and on the other hand from the *usus* (*ædium*), by reason that the habitator need not occupy the house himself, but may transfer to another the entire exercise of his right, which the usuary is not entitled to do (comp. § 303 in fine). Moreover, the right to inhabit another's house, when regarded by itself, occurs as *Weber* (on Höpfner, Comm. § 387.) remarks, not only as a distinct servitude (*habitatio*), but also in various other forms, e. g. as a consequence of the ususfructus or usus, as a consequence of a contract of hiring, as a revocable permission, &c. With regard to the official residences of state-officers and clergymen and their widows, Weber observes, that the occupants are not required to furnish security, to pay public taxes, or to make the necessary repairs; since the use of the house forms a portion of their salary.—See Ed.'s note, p. 324.

another's slave or animal, which, according to the particular nature or qualities of such slave or animal, could be derived therefrom.[a] This right terminated when the slave or animal died or fell to a third party by *usucapio*. *Operæ servorum* can no longer occur in Germany; but *operæ animalium* may possibly, though they scarcely ever do.

II. Predial Servitudes.[b]

A. Their Nature.

§ 306. By *predial servitude* is meant a right which is granted for the advantage of one piece of land over another, and which may be exercised by every possessor of the land entitled against every possessor of the servient land.[c] Consequently, it always presupposes two pieces of land (*prædia*) belonging to different proprietors;[d] one of which is burdened with the servitude (*prædium quod servitutem debet, prædium serviens s. fundus servus*),[e] and one for the advantage of which the servitude is conferred (*prædium cui servitus debetur*, now called *prædium dominans*).[f] Such lands must be *vicina*, i. e. they must not lie far apart, and at all events must have such a natural location with regard to each other, as to render the exercise of the servitude practicable.[g]

(*a*) Dig. 7. 7.—33. 2.—fr. 6. pr. D. 7. 7.—*Rosshirt*, l. c. p. 199 seqq.

(*b*) Inst. 2. 3.—Dig. 8. 1–6.—Cod. 3. 34.—*Cujacii* Recitatt. ad Dig. Lib. 8. tit. 1–6. (in his Works Vol. 7.)—*Donelli* Comm. jur. civ. Lib. 11. c. 1–8. 13. 14—*Zachariä* in Hugo's Civ. Mag. Vol. 2. No. 15.—*Van Alderwerell* de servitutibus realibus. Leyden, 1809.—*Stever* de servitutibus prædiorum. Part 1. Rostock, 1817.—*Seuffert*, Erört. Divis. 2. Nos. 10–14.

(*c*) fr. 12. D. 8. 4. (Paulus) "Cum *fundus fundo servit, vendito quoque fundo servitutes sequuntur*. Ædificia quoque fundis, et fundi ædificiis eadem conditione serviunt."—const. 3. C. 3. 34.

(*d*) fr. 1. § 1. D. 8. 4. (quoted above, p. 326. note *b*.) — § 3. J. 2. 3.—fr. 14. § 3. D. 34. 1.—fr. 5. D. 8. 3.

(*e*) fr. 9. D. 8. 1. (Celsus) "Si cui simpliciter via per fundum cujuspiam cedatur vel relinquatur, in infinito (videlicet per quamlibet ejus partem) ire agere licebit: modo civiliter. Nam quædam in sermone tacite excipiuntur; non enim per villam ipsam, nec per medias vineas ire agere sinendus est, cum id æque commode per alteram partem facere possit, minore *servientis fundi* detrimento. Verum constitit, ut, qua primum viam direxisset, ea demum ire agere deberet, nec amplius mutandæ ejus potestatem haberet; sicuti Sabino quoque videbatur, qui argumento rivi utebatur, quem primo qualibet ducere licuisset, posteaquam ductus esset transferre non liceret. Quod et in via servandum esse, verum est."—fr. 14. D. 8. 2. (Papirius Justus) "Imperatores Antoninus et Verus Augusti rescripserunt: in area, *quæ nulli servitutem deberet*, posse dominum vel alium ejus voluntate ædificare, intermisso legitimo spatio a vicina insula."—fr. 23. § 2. D. 8. 3. (Paulus) "Si *fundus serviens, vel is, cui servitus debetur*, publicetur, utroque casu durant servitutes; quia cum sua conditione quisque fundus publicatur."—fr. 20. § 1. D. 41. 1. (quoted above, p. 308. note *b*).

(*f*) fr. 23. § 2. 3. D. 8. 3. (quoted in the last preceding note). — fr. 5. § 9. in fin. D. 39. 1.

(*g*) fr. 5. § 1. D. 8. 3. (Ulpianus) "Neratius libris ex Plautio ait: nec haustum pecoris, nec appulsum, nec cretæ eximendæ, calcisque coquendæ jus posse in alieno esse, *nisi fundum vicinum habeat*; et hoc Proculum et Atilicinum existimasse ait. Sed et ipse adjicit: ut maxime calcis coquendæ et cretæ eximendæ servitus constitui possit, non ultra posse, quam quatenus ad eum ipsum fundum opus sit."—fr. 7. § 1. D. ibid. (Paulus) "In rusticis autem prædiis *impedit servitutem medium prædium, quod non servit*."—fr. 38. D. 8. 2. (Idem) "Si ædes meæ a tuis ædibus tantum distent, *ut prospici non possint*, aut medius mons earum conspectum auferat, *servitus imponi non potest*."—fr. 7. § 1. D. 8. 4.—fr. 5. D. 8. 5. (Paulus) "Et ideo si inter meas et Titii ædes, tuæ ‖ædes‖ intercedant, possum Titii ædibus servitutem imponere, *Ne liceat ei altius tollere*, licet tuis non imponatur: quia donec tu non extollis, est utilitas servitutis."—Comp. *Thibaut*, System. 7th Ed. § 621.

B. General Principles.

a. Respecting their Requisites, Character, and Extent.

§ 307. The general principles with regard to predial servitudes,[a] are as follows: 1. The predial servitude must have a *causa perpetua*, i. e. the land servient must from its natural condition be permanently capable of affording the intended advantage to the land entitled; and that too without any necessity for positive action on the part of the proprietor of the land servient.[b] 2. The servitude is to be regarded as an appurtenance of the land entitled; hence it can be neither alienated, mortgaged, nor leased without the land, nor can it be transferred from the same to another piece of land.[c] 3. Predial servitudes are indivisible, and therefore cannot be partially acquired, exercised, or lost;[d] yet they may be restricted as to time and place, and also with respect

(*a*) Comp. *Schrader*, Civ. Abh. No. 5.

(*b*) fr. 28. D. 8. 2. (Paulus) "Foramen in imo pariete conclavis vel triclinii, quod esset proluendi pavimenti causa, id neque flumen esse, neque tempore acquiri placuit. Hoc ita verum est, si in eum locum nihil ex cœlo aquæ veniat; neque enim perpetuam causam habet, quod manu fit. At quod ex cœlo cadit, etsi non assidue fit, ex naturali tamen causa fit, et ideo perpetuo fieri existimatur. Omnes autem servitutes prædiorum perpetuas causas habere debent, et ideo neque ex lacu, neque ex stagno concedi aquæductus potest. Stillicidii quoque immittendi naturalis et perpetua causa esse debet."—fr. 23. § 1. D. 8. 3. (Idem) "Si lacus *perpetuus* in fundo tuo est, navigandi quoque servitus, ut perveniatur ad fundum vicinum, imponi potest."—fr. 2. D. 8. 4. (Ulpianus) "De aqua per rotam tollenda ex flumine, vel haurienda vel si quis servitutem castello imposuerit, quidam dubitaverunt, ne hæ servitutes non essent. Sed rescripto Imperatoris Antonini ad Tullianum adjicitur: *licet servitus jure non valuit*, si tamen hac lege comparavit, seu alio quocumque legitimo modo sibi hoc jus acquisivit, tuendum esse eum, qui hoc jus possedit."—fr. 1. § 4. D. 43. 22. (Idem) "Hoc interdictum de cisterna non competit: *nam cisterna non habet perpetuam causam, nec vivam aquam*. Ex quo apparet, in his omnibus exigendum, ut viva aqua sit. Cisternæ autem imbribus concipiuntur. Denique constat, interdictum cessare, si lacus, piscina, puteus vivam aquam non habeat."—*Heineccius*, Diss. de causa servitutum perpetua; in his Works. Vol. 3. p. 177. *Seuffert*, Erört. II. p. 43.—Comp. fr. 3. D. 8. 3. and on this passage: *Schrader*, Civ. Abh. p. 319.—See also *Thibaut*, System. § 752. Hence if there is no aqua viva or perennis, only a personal servitude or obligatio arises. We add here for the sake of explanation, that according to strict law every predial servitude must have a *causa perpetua*, i. e. their perpetual duration must be already secured by nature so that there is no need of any positive assistance on the part of the possessor of the servient land. This is the reason why a predial servitude does not apply to ponds and cisterns which have no spring and are consequently without a causa perpetua. Although according to the later law, the holder of such servitudes has certainly a claim to be protected in his right, as is shown by Ulpian in fr. 2. just quoted.

(*c*) fr. 16. D. 8. 1. (Julianus) "Ei, qui pignori fundum accepit, non est iniquum *utilem petitionem servitutis dari*, sicuti ipsius fundi utilis petitio datur. Idem servari convenit et in eo, ad quem vectigalis fundus pertinet."—fr. 44. D. 19. 2. (Ulpianus) "Locare servitutem nemo potest."—fr. 33. § 1. D. 8. 3. (quoted above, p. 322. note *b*.)—fr. 11. § 3. D. 20. 1. (Marcianus) "Jura prædiorum urbanorum *pignori dari non possunt*, igitur nec convenire possunt, ut hypothecæ sint."—fr. 12. D. ibid. (Paulus) "Sed an viæ, itineris, actus, aquæductus pignoris conventio locum habeat, videndum esse Pomponius ait, *ut talis pactio fiat, quamdiu pecunia soluta non sit, eis servitutibus creditor utatur (scilicet si vicinum fundum habeat)* et si intra diem certum pecunia soluta non sit, vendere eas vicino liceat. Quæ sententia propter utilitatem contrahentium admittenda est."

(*d*) fr. 11. D. 8. 1.–fr. 17. D. ibid. (Pomponius) "Viæ, itineris, actus, aquæductus *pars* in obligationem deduci non potest, quia usus eorum *indivisus* est. Et ideo si stipulator decesserit pluribus heredibus relictis, singuli *in solidum* viam petunt, et si promissor decesserit pluribus heredibus relictis, a singulis heredibus *solida* petitio est."—fr. 18. D. 8. 3. (Ulpianus) "*Una* est via, etsi per plures fundos imponatur: cum *una* servitus sit. Denique quæritur: an si per unum fundum iero, per alium non per tantum tempus, quanto servitus amittitur, an retineam servitutem? Et magis est, ut aut *tota* amittatur, aut *tota*

to the mode of their exercise; their commencement and termination may likewise be made dependent on conditions.[a] 4. When no restriction has been made, a predial servitude may regularly be exercised over all the land servient;[b] but such exercise must always be confined to the real necessities of the dominant land.[c]

b. Respecting the Right of Exercising them.

§ 308. 1. As a general rule, a predial servitude may be exercised by every possessor of the dominant land, except where it is limited expressly to the person of the original grantee; but such limitation alone does not affect its character as a predial servitude, neither does it extend the rights of the party beyond the real necessities of the dominant property.[d] 2. He who is entitled to exercise a servitude, may do every thing without which such exercise would be impracticable;[e] as a general rule, however, he cannot demand that the owner of the thing servient should repair it, but must do it himself, if such repairs become necessary to the exercise of the servitude.[f] 3. All predial

retineatur. Ideoque si nullo usus sum, *tota* amittitur; si vel uno, *tota* servatur."—fr. 32. D. ibid. (Africanus) "Fundus mihi tecum communis est; partem tuam mihi tradidisti, et ad eundem viam per vicinum tuum proprium. Recte eo modo servitutem constitutam ait: neque, quod dici soleat, *per partes nec acquiri nec imponi servitutes posse*, isto casu locum habere. Hic enim non *per partem* servitutem acquiri: utpote quum in id tempus acquiratur, quo proprius meus fundus futurus sit."—fr. 6. pr. D. 8. 6.—fr. 5. D. 7. 1. (Papinianus) "Ususfructus et ab initio *pro parte indivisa* vel *divisa* constitui, et legitimo tempore similiter amitti, eademque ratione per legem Falcidiam minui potest. Reo quoque promittendi defuncto, in partes hereditarias ususfructus obligatio dividitur, et si ex communi prædio debeatur, uno ex sociis defendente, pro parte defendentis fiet restitutio."—*Kori* in Elvers' Themis. Vol. 1. p. 481.—*Cramer* in Hugo's Civ. Mag. Vol. 6. p. 1–33.—With regard to the consequences and limitations of this rule, see: fr. 23. § 3. fr. 25. D. 8. 3.—fr. 140. § 2. D. 45. 1. And *Schrader*, Civ. Abh. p. 284. See also fr. 8. § 1. D. 8. 1.—*Vangerow*, Leitf. I. p. 646.

(*a*) fr. 4. D. 8. 1. (Papinianus) "Servitutes ipso quidem jure neque ex tempore, neque ad tempus, neque sub conditione, neque ad certam conditionem, verbi gratia: *quamdiu volam*, constitui possunt. Sed tamen si hæc adjiciantur, per pacti, vel per doli exceptionem occurretur contra placita servitutem vindicanti, idque et Sabinum respondisse Cassius retulit, et sibi placere."—§ 1. and 2. D. ibid. (quoted above, p. 323. note *d*.)—fr. 6. D. ibid.—fr. 13. § 1. D. 8. 3.—Comp. p. 326. note *b*.

(*b*) fr. 21. D. 8. 3.—fr. 9. D. 8. 1.

(*c*) fr. 5. § 1. in fin. D. 8. 3.—fr. 9. D. 8. 1.

(*d*) fr. 4. fr. 6 pr. fr. 37. D. 8. 3.—fr. 14. § 3. D. 34. 1.—*Löhr* (in his Mag. Vol. 3. p 495.) is of a different opinion. He regards the servitude in all such cases as a usufruct or a usus. But see contra: *Mühlenbruch* in the Archiv Civ. Prax. Vol. 15. p. 382.—*Rosshirt*, Vermächtnisse. II. 83.—*Vangerow*, l. c. I. p. 628.

(*e*) fr. 10. D. 8. 1.—(Celsus) "Si iter legatum sit, qua nisi opere facto, iri non possit, licere fodiendo, substruendo iter facere, Proculus ait."—fr. 20. § 1. D. 8. 2. (Paulus) "Si domo mea altior area tua esset, tuque mihi per aream tuam in domum meam ire agere concessisses, nec ex plano aditus ad domum meam per aream tuam esset, vel gradus, vel clivos propius januam meam jure facere possum, dum ne quid ultra, quam quod necesse esset, itineris causa domoliar."—fr. 3. § 3. D. 8. 3. (Ulpianus) "Qui habet haustum, iter quoque habere videtur ad hauriendum, et ut ait Neratius libro tertio Membranarum, sive ei jus hauriendi et adeundi concessum sit, utrumque habebit, sive tantum hauriendi, inesse et haustum. Hæc de haustu ex fonte privato. Ad flumen autem publicum idem Neratius eodem libro scribit, iter debere cedi, haustum non oportere, et si quis tantum haustum cesserit, nihil eum agere."

(*f*) fr. 6. § 2. D. 8. 5. (quoted above, p. 322, note *c*.)—arg. fr. 15. § 1 D. 8. 1.—fr. 81. § 1. D. 18. 1. (quoted above, p. 322. note *c*.)—*Richter*, Diss. de domino serviente ad prædii servientis refectionem obligato. Leipsic, 1733.—*Heisler*, Jur. Abh. Nos. 1. 2.—An exception is made only in the case of a *servitus oneris ferendi*. fr. 6. § 2. fr. 8. § 2. D. 8. 5.—fr. 8. pr. D. ibid. (Ulpianus) "Sicut autem *refectio parietis ad vicinum pertinet*;

servitudes belong to the dominant land itself, and not merely to the *superficies* of the same, even though they be specially designed for the advantage of the superficies. So likewise they apply to the servient land, and not to its surface merely.[a] (By *superficies* is meant every thing above the surface.)

C. *Their Kinds.*[b*]

§ 309. Predial servitudes are either *servitutes* (*s. jura*) *prædiorum urbanorum*, or *servitutes* (*s. jura*) *prædiorum rusticorum.*[c] By *prædium rusticum* is meant an estate or property principally destined for the production of fruit: every other kind of estate is termed a *prædium urbanum*. Hence to the *prædia urbana* belong especially dwelling-houses, without distinction as to whether they are situated in town or country, also stables, walls, building-sites, store-houses, granaries, and the like.[d] A *servitus prædii urbani* is therefore one that *usually* occurs as the right of a *prædium urbanum*; while a *servitus prædii rustici* is one that is commonly conferred upon a *prædium rusticum*, and more particularly one that serves for the promotion of agriculture and cattle-breed-

ita *fultura ædificiorum* vicini, cui servitus debetur, quamdiu paries reficietur, *ad inferiorem vicinum non debet pertinere*; nam si non vult superior fulcire, deponat: et restituat, quum paries fuerit restitutus. Et hic quoque, sicut in ceteris servitutibus actio contraria dabitur: hoc est, jus tibi non esse, me cogere."—fr. 33. D. 8. 2. See below, § 310. note *f*.

(*a*) fr. 13. pr. D. 8. 3.—fr. 11. pr. D. 8. 2. (Idem) "Qui luminibus vicinorum officere, aliudve quid facere contra commodum eorum volet, sciat, *se formam ac statum antiquorum ædificiorum custodire debere.*"

(*b*) Siever de servitt. prædior.—*Pfordten* in the Archiv Civ. Prax. Vol. 20. No. 2.—*Mühlenbruch*, l. c. § 276. Nos. 2. 8.

(*c*) § 3. J. 2. 2.—fr. 1. D. 8. 1. (quoted above, p. 326. note *b*).

(*d*) fr. 198. D. 50. 16 (Ulpianus) "*Urbana prædia omnia ædificia accipimus*, non solum ea quæ sunt in oppidis. sed et si forte stabula sunt, vel alia meritoria in villis et in vicis, vel si prætoria voluptati tantum deservientia, quia *urbanum prædium* non locus facit sed materia. Proinde *hortos* quoque, si qui sunt in ædificiis constituti, dicendum est urbanorum appellatione contineri. Plane si plurimum horti in reditu sunt, vinearii forte. vel etiam olitorii, magis hæc non sunt urbana."—§ 1. J. 2. 3.—fr. 1. pr. D. 8. 4.—fr. 3. D. 20. 2. (Idem) "Si horreum fuerit conductum, vel deversorium, vel area, *tacitam conventionem de invectis et illatis etiam in his locum habere*, putat Neratius. Quod verius est."—fr. 4. ibid. (Neratius) "Eo jure utimur, ut, quæ in *prædia urbana* inducta illata sunt, pignori esse credantur, quasi id tacite convenerit; in rusticis prædiis contra observatur. § 1. Stabula, quæ non sunt in continentibus ædificiis, quorum *prædiorum ea* numero habenda sint, dubitari potest. Et quidem *urbanorum* sine dubio non sunt, quum a ceteris ædificiis separata sint; quod ad causam tamen taciti pignoris pertinet, non multum ab *urbanis* prædiis differunt."—fr. 7. D. ibid. (Pomponius) "In *prædiis rusticis* fructus, qui ibi nascuntur, tacite intelliguntur pignori esse domino fundi locati, etiamsi nominatim id non convenerit. § 1. Videndum est, ne non omnia illata vel inducta, sed ea sola, quæ, ut ibi sint, illata fuerint, pignori sint. Quod magis est."

* *Prædium urbanum* denotes every building, whether in town or country, and whether used for a dwelling or for business or farming purposes; a *prædium rusticum* is every empty place. Comp. the passages cited in note *c*. and § 1. J. 2. 1. The principal differences between servitutes *urbanæ* and *rusticæ*, are that the latter can never be other than affirmative, and that they admit of being mortgaged. Some have asserted that affirmative servitudes presuppose, in order to become extinct by non-user, a *usucapio libertatis*, which is the name given to an act of the proprietor whereby he puts and maintains himself in possession of the natural freedom from a servitude and excludes the further exercise of the latter; but that this opinion is not correct, will be seen from the last note to § 320, p. 352.

ing.[a] Some servitudes, however, that are usually *urbanæ*, may be granted to a *prædium rusticum*; while some of those that are usually *rusticæ*, may be conferred upon a *prædium urbanum*.[b]

The Roman law sets no limits to the number of predial servitudes; but it prescribes the general conditions that are required to constitute such a servitude (§§ 307, 308). Under these conditions, therefore, all the various rights that one piece of land can enjoy over another, may be granted as predial servitudes.[c] Accordingly the predial servitudes expressly mentioned in the Roman law, and enumerated in §§ 310–316, are to be regarded only as examples of such servitudes as are of most frequent occurrence.[d]

1. Servitutes prædiorum urbanorum.[e]

The principal *servitutes prædiorum urbanorum* which occur in the Roman law are as follows:

A. Oneris ferendi and *tigni immittendi.*

§ 310. 1. The *servitus oneris ferendi*, or the right to let one's building rest upon the building, wall, or pillars of one's neighbour. This servitude has the peculiarity, that every proprietor of the servient wall must keep the same in such good order and repair as was agreed upon at the establishment of the servitude; but when nothing particular has been settled with regard to it, he must at least preserve it in the condition it was in when the servitude was established.[f] He is at liberty, however, by relinquishing the thing servient, to release himself from the burden of keeping it in repair; and in all cases the party entitled must see to the support of the building while the wall on which it rests is undergoing repair.[g]

2. The *servitus tigni immittendi*, or the right of inserting beams in a neighbour's wall, in order e. g. to form a covered walk alongside of it (*porticus ambulatoria*), or merely for the greater security of one's building.[h] If the beams have become useless, the entitled party may replace them by new ones; but he has no right to insert a greater number than before.[i]

(*a*) pr. § 1. J. 2. 3.—See *Unterholzner*, Verjährungslehre. Vol. 2. § 191.

(*b*) fr. 2. D. 8. 2.—fr. 2. pr. D. 8. 3.—fr. 11. § 1. D. 6. 2.—fr. 14. § 1. D. 8. 1.

(*c*) For instance, fr. 3. § 1. 2. D. 8. 3.

(*d*) Concerning the distinction between *servitutes continuæ* and *discontinuæ*, see below, § 322. and the Editor's note thereon.

(*e*) *Glück*, Comm. Vol. 10. § 667–673.

(*f*) fr. 6. § 2. D. 8. 5. (quoted above, p. 322. note *c*.)—fr. 7. D. 8. 5.—fr. 33. D. 8. 2.—With respect to the many attempts which have been made to explain this peculiarity of the *servitus oneris ferendi*, see: *Weber* zu Höpfner. § 357. note *c*.—*Glück*, Comm. Vol. 10. § 661. — *Konopak* de duobus fragmentis ad servitutem oneris ferendi spectantibus. Jena, 1822.— *Stever* de servitt. præd. c. 3. § 12. 13.—*Mühlenbruch* in his Cession. p. 8. note 17. and in the Archiv Civ. Prax. Vol. 14. p. 321. — Comp. also the Editor's note to § 295.

(*g*) fr. 6. § 2. in fin. fr. 8. pr. D. 8. 5. (quoted above. p. 337. note *f*).

(*h*) fr. 8. § 1. 2. D. 8. 5.—fr. 242. § 1. D. 50. 16.

(*i*) fr. 14. pr. D. 8. 5. compared with fr. 11. pr. in fin. D. 8. 6.

B. Projiciendi, altius non tollendi, and *luminum.*

§ 311. 1. The *servitus projiciendi* is the right of building a projection, e. g. a balcony, piazza, or gallery, from one's house in the open space belonging to one's neighbour. One species of this kind of servitude is the *servitus protegendi*, or the right of adding to one's building a shed projecting over the empty space belonging to one's neighbour.[a] These two servitudes rest on the principle that property in a piece of land entitles also to the aërial space above it.

2. The *servitus altius non tollendi.* This is a right attached to a house, by which its proprietor can prevent his neighbour from building his own house higher than it is already, or above a certain height.[b] A release from a former restriction of this kind, i. e. the right to build higher than one was formerly allowed to do, was called by the Romans a *jus altius tollendi.*[c] Somewhat connected with the *servitus altius non tollendi* are:

3. The *servitus luminum* and *ne luminibus officiatur*, as also the *servitus de prospectu* and *ne prospectui officiatur.* *Lumina** are windows or openings to obtain light for one's building, and in general such light as one's building has or requires; *prospectus* is the view.[d] The *servitus*

(*a*) fr. 2. D. 8. 2.—fr. 242. § 1. D. 50. 16. —fr. 29. § 1. D. 9. 2.

(*b*) § 1. J. 2. 3.—fr. 2. fr. 11. § 1. fr. 12. 21. 32. pr. D. 8. 2.—fr. 7. § 1. fr. 16. D. 8. 4.—const. 8. 9. C. 3. 34.

(*c*) See § 312. note *e.* and the passages there cited; also *Hugo* R. G. p. 504. and *Löhr* in his Mag. Vol. 3. p. 126. The same opinion was maintained by *Cujacius* in not. poster. ad § 2. J. 4. 6. (quoted above, p. 308. note *c.*) Thus is explained the reason why in § 2. J. cited, the actio confessoria is granted to him who pretends to have acquired a jus altius tollendi, and the actio negatoria to the neighbour who disputes the same. See concerning it, *Löhr* in his Mag. Vol. 3. p. 504. The view taken in § 312. note *d.* is however opposed by *Schilling*, Bemerkungen. p. 144 seqq. Comp. also *Unterholzner*, Vol. 2. p. 118 seq. 127 seq. —*Van Ostendorf*, Diss. de jure altius tollendi. Louvain, 1830.—*Busse de serv. altius* toll. vel non toll. Leipsic, 1834.

(*d*) fr. 16. D. 8. 2.—Comp. *Thibaut*, System. 7th Ed. § 706.

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* *Lumina*, signifies not merely lights, but also windows. *Feuerbach* (l. c.), with some of the glossators, understands it only in the former sense; and according to him the words "lumina nostra excipere" in fr. 4. D. cit. had reference to a servitude of darkness or shade (see next page, note *b*); by which the servient neighbour is obliged to intercept the light that falls upon our property, so that e. g. he cannot remove a building that gives us shade. Taking into account the glowing climate of Italy, where the wealthier classes are fond of living in the shadiest streets, this exposition seems to Thibaut not so ridiculous as some jurists have considered it. Still the true sense of the passage is rather this: that the neighbour must acquiesce in our having a *window* in our common wall or in his wall. This interpretation, which is also preferred by Thibaut, is the usual one, and is supported by the strongest reasons. Moreover, it may be remarked here, that the full liberty of building, and consequently the right of making new openings or windows in one's own house, is naturally contained in the rights of free ownership; and that the owner, according to the Roman law, needs a servitude to that effect only in case his house stands directly upon his neighbour's boundary line, and overlooks his premises. With reference to this case, special restrictions (not known to the Roman law) have been adopted in the French Civil Code, Art. 676–680. Compare also the Civil Code of Louisiana, Art. 692 and 778.

luminum (*s. luminis excipiendi s. immittendi* or *fenestræ aperiendæ*)[a] is therefore the right of making windows or other openings in a wall belonging to another or common to both, in order to obtain light for one's building;[b] or else in one's own wall overlooking a neighbour's premises (which, according to the laws of some of the German states, no one is entitled to do, unless he has acquired a servitude to that effect).[c] The *servitus ne luminibus officiatur* consists in this, that a man is not allowed to deprive his neighbour's building of light by means of new buildings, trees, or other obstructions. Whether in such a case he must leave to his neighbour's building merely the necessary light, or all the light which it formerly had, depends on the manner and conditions under which the servitude was granted or acquired.[d] The *servitus de prospectu* or *ne prospectui officiatur* (for there is no difference between them)* consists in the right which one has to the prospect from his house or ground, and of which his neighbour is not permitted to deprive

(*a*) That these different terms mean the same thing, may be seen by a comparison of the following passages. fr. 4. D. 8. 2. (Paulus) "Luminum servitute constituta id acquisitum videtur, *ut vicinus lumina nostra excipiat.* Cum autem servitus imponitur, *ne luminibus officiatur*, hoc maxime adepti videmur, *ne jus sit vicino, invitis nobis altius ædificare, atque ita minuere lumina nostrorum ædificiorum.*"—fr. 23. pr. fr. 40. D. ibid.—fr. 13. § 7. D. 7. 1. (Ulpianus) "Sed si ædium ususfructus legatus sit, Nerva filius et lumina immittere eum posse, ait. Sed et colores et picturas, et marmora poterit, et sigilla. et si quid ad domus ornatum pertinet. Sed neque diætas transfirmare, vel conjungere, aut separare ei permittetur, vel aditus posticasve vertere. vel refugia aperire, vel atrium mutare vel viridaria ad alium modum convertere; excolere enim quod invenit potest, qualitate ædium non immutata. Item Nerva: eum, cui ædium ususfructus legatus sit, altius tollere non posse, ait, quamvis lumina non obscurentur. quia tectum magis turbatur. Quod Labco etiam in proprietatis domino scribit. Idem Nerva: nec obstruere eum posse." — const. 12. § 2. C. 8. 10.

(*b*) Comp. the passages cited in the last preceding note. The opinions as to what this servitude consisted in among the Romans, are, however, very much at variance. *Feuerbach* in Civ. Vers. Vol. I. No. 1. regards it rather as a servitude of shade than of light, i. e. as a right to the shade afforded by a neighbouring house or wall, whereby the owner of the house or wall may be prohibited from removing them. See contra: *Dabelow*, Ueber die servitus luminum der Römer. Halle, 1804. And, again, on the other hand: *Pæhlig*, Diss. in qua Feuerbachii de luminum servitute sententia contra Dabelowium defenditur. Groningen, 1811.—*Moser* (in his Beiträge zur Röm. Gesetzkunde. Stuttgart. 1815) even goes the length of treating it as a servitude of *reflection*, by virtue of which one's neighbour is obliged to suffer the rays of the sun reflected from the whited wall of one's building on his windows! (See a review in Leipz. Lit. Zeit. 1816. No. 169). Among the other writings on this subject, the following may be noticed: *Griesinger* de servitute luminum et ne luminibus officiatur Leipsic, 1819.—*Goldschmidt*, in the Archiv Civ. Prax. Vol. 5. p. 422.—*Eichstädt* de servitute luminum et ne luminibus officiatur. Jena, 1820.—*Fiess* de servitute luminum et ne luminibus officiatur. Liege, 1824.

(*c*) const. 12. § 3. C. 8. 10.—*Gesterding*, Nachforschungen. Vol. 3. p. 453.

(*d*) fr. 4. 11. pr. fr. 15. fr. 17. pr. § 1. fr. 22. 23. pr fr. 31. D. 8. 2.—fr. 16. D. 8. 4.—fr. 15. D. 8. 5. and particularly fr. 10. D. 8. 2. compared with fr. 30. D. 7. 1.—See *Höpfner*, Comm. Ed. by Weber. § 362.

* The Roman law uses the terms, '*servitus prospectus*' and '*ne prospectui officiatur*,' without making any distinction between them. Some jurists have proposed to explain this diversity of expression, by regarding the former as one that gives us a right of prospect which we formerly had not: while the latter, in their opinion, gives us a right to prohibit our neighbour from hindering us in the enjoyment of one already established. However this may be, thus much is certain, that both in fact amount only to a *servitus prospectus*.

him by erecting a new building or any other obstruction.[a] The release from a former *servitus ne luminibus aut prospectui officiatur* is called a *jus luminibus aut prospectui officiendi.*[b]

C. Stillicidii, sterculinii, cloacæ, and fumi.

§ 312. 1. The *servitus stillicidii vel fluminis recipiendi s. avertendi s. immittendi. Stillicidium* is the drip of water from the eaves, and *flumen* is the rain-water collected from the roof and carried off by the gutters. The servitudes here spoken of consist either in the right to lead off the water from one's house on to the house or ground of one's neighbour,[c] or in the right to lead off the water from a neighbour's house on to one's own land for the purpose of cleansing or irrigating the same.[d] The release from a former servitude of this kind was also regarded by the Romans as a special kind of right similar to a servitude, and was called the *servitus s. jus stillicidii vel fluminis non recipiendi.*[e]

2. The *servitus sterculinii* is the right of placing a dunghill against a boundary wall though on one's own ground.[f]

3. The *servitus cloacæ mittendæ* is the right of having a sewer through the house or over the ground of one's neighbour.[g]

4. The *servitus fumi immittendi s. cuniculi balnearii habendi*, is the right of leading off some uncommonly heavy smoke or other unpleasant vapour through the chimney or over the ground of one's neighbour.[h]

(*a*) fr. 3. 12. 15. D. 8. 2. With respect to these servitudes, opinions, especially those of the later writers, are likewise much at variance. See the works referred to, p. 341. note *b*. As to the servitudes of light and prospect, the Roman names are at present of no moment in a practical point of view, as all depends on the purpose and manner of the grant and on its extent.

(*b*) fr. 2. D. 8. 2.

(*c*) § 1. J. 2. 3.—fr. 2. fr. 17. § 3. fr. 20. § 3 –6. D. 8. 2.—fr. 8. pr. D. 8. 6.—fr. 16. D. 8. 5.

(*d*) Many jurists consider this as a servitus stillicidii non recipiendi; e. g. *Vinnius* in his Comm. ad § 1. J. 2. 3. and § 2. J. 4. 6.—*Glück*, Comm. Vol. 10. p. 125.—*Th. M. Zachariä*, Institutionen. p. 317.—*Schilling*, Bemerk. über Röm. R. G. p. 148. That this however is not so, may be seen from fr. 28. D. 8. 2.

(*e*) The matter is thus represented by THEOPHILUS ad § 1. J. 2. 3. "Et quænam sunt servitutes ædium? ut onera vicini sustineam. Sunt autem hæ: Habebam domum, habebas et tu in propinquo domum, rogavi te, ut mihi liceret, trabes meas tuis immittere parietibus, vel ut mihi liceret stillicidia aut flumina ex meis tegulis derivare in tua tecta vel in tuam aream, vel *tu habebas tale jus adversus ædes meas et rogavi te, ut ne derivares in mea tecta aut in meas areas stillicidia aut flumina ex tuis tegulis*; vel rogavi te ut concederes, mihi tale jus, ut ne tibi liceret, domum tuam altius tollere atque inde lumen mearum ædium eripere." This view, it must be owned, disagrees with the nature of a servitude, which in its proper sense is a restriction of the natural freedom of ownership; and hence *Schulting* says of the jus stillicidii non recipiendi, in his *Jurispr. Antejust.* ad Caium. Lib. 2. tit. 1. *not.* 29: "*quod non sit nova servitus, sed res ad naturalem tantum redit libertatem.*" Still with regard to the servitutes prædiorum urbanorum, the Romans seem to have considered as a servitude, or at least as a right coming very near to it, the right of the natural freedom of ownership which the owner re-acquired on the termination of a former servitude. This will explain not only the jus stillicidii non recipiendi in the sense in which it is taken by *Theophilus*, but also the jus altius tollendi and luminibus officiendi. fr. 2. 21. 32. pr. D. 8. 2.—fr. 26. pr. D. 44. 2.—fr. 2. pr. D. 8. 3. —The opinion adopted here by Mackeldey is very justly disputed by *Fritz*, zu Wening. p. 356. *Thibaut*, System. § 753., and the writers cited p. 341. note *b*., since a servitude from its nature cannot be conceived of but as a restriction of the freedom of ownership.

(*f*) fr. 17. § 2. D. 8. 5.—*Gesterding* in Elvers' Allgem. Jur. Zeit. 1829. No. 27. 28. and in his Nachforschungen. Vol. 3. p. 398.

(*g*) fr. 7. D. 8. 1.—fr. 2. pr. D. 8. 3.

(*h*) fr. 8. § 5–7. D. 8. 5.—*Spangenberg* in the Archiv Civ. Prax. Vol. 2. p. 265.—*Funke*,

2. Servitutes prædiorum rusticorum.a

The principal *servitutes prædiorum rusticorum* that occur in the Roman law are the following:

A. The rights of Way.

§ 313. To the *rights of way*, by land and by water,[b] belong: *a.* The *servitus itineris.* This among the Romans conferred the privilege of walking, riding on horseback, and of being carried in a sedan over another's ground.[c] *b.* The *servitus actus*, which secured, in addition to the rights contained in the *iter*, that of driving cattle or riding in a carriage over the servient land.[d] *c.* The *servitus viæ*; this embraced all that was contained in the *iter* and *actus*, and also the right of dragging stones and timber along the path.[e] If no special agreement was made between the parties concerning the width of the way, the law provided that it should be when running in a straight line (*in porrectum*) eight feet, and at a turning (*in aufractum*) sixteen feet.[f] A servitude of way may be granted in such a manner as to allow the entitled party to traverse the servient ground in every direction, and consequently to change his path at pleasure;[g] but when no such grant has been made, the entitled party is confined to a certain direction. If the line was not determined at the establishment of the servitude, and the parties cannot come to an understanding about it, it must be

Beitr. zur Erörterung pract. Rechtsmaterien. Chemnitz. 1830. p. 149.—*Gesterding*, Nachforschungen. Vol. 3. p. 398.

(*a*) *Glück*, Comm. Vol. 10. § 674–683.

(*b*) Concerning the Roman rights of way see: *Biener*, Diss. de differentiis itineris, actus et viæ genuinis. Leipsic, 1804.—*Seuffert*, Erörterungen. II. p. 56.—*Gensler* in the Archiv Civ. Prax. Vol. 4. p. 244.—*Puchta*, Civ. Abh. No. 3.—*Kritz*, Exeget. pract. Abh. No. 1. 2.—*Göschen*, Grundriss zu Pand. Vorl. p. 147.—Comp. also *Kent*, Comm. III. 435. 419 seqq. 431 seqq. and *Mittermaier*, Deutsch. Priv. R. I. p. 452 seqq.

(*c*) pr. J. 2. 3.—fr. 1. pr. D. 8. 3. (Ulpianus) "Servitutes rusticorum prædiorum sunt hæ: *iter, actus, via, aquæductus. Iter* est jus eundi, ambulandi hominis, non etiam jumentum agendi. *Actus* est jus agendi vel jumentum vel vehiculum. Itaque qui iter habet, actum non habet, qui actum habet, et iter habet, etiam sine jumento. *Via* est just eundi, et agendi, et ambulandi; nam et iter et actum in se via continet. *Aquæductus* est jus aquam ducendi per fundum alienum." — fr. 7. pr. D. ibid. (Paulus) "Qui sella aut lectica vehitur, ire, non agere dicitur. *Jumentum vero ducere non potest, qui iter tantum habet.* Qui actum habet, et plaustrum ducere, et jumenta agere potest; sed trahendi lapidem aut tignum neutri eorum jus est. Quidam: nec hastam rectam ei ferre licere, quia neque eundi neque agendi gratia id faceret, et possent fructus eo modo lædi. Qui *viam* habent, eundi agendique jus habent; plerique: et trahendi quoque, et rectam hastam ferendi, si modo fructus non lædant."—fr. 8. D. ibid. (Gaius). *Viæ* latitudo ex lege duodecim tabularum in porrectum octo pedes habet, in aufractum, id est, ubi flexum est, sedecim."—fr. 12. D. ibid. (Modestinus). "Inter *actum* et *iter* nonnulla est differentia. Iter est enim, qua quis pedes vel eques commeare potest; actus vero, ubi et armenta trajicere et vehiculum ducere liceat."

(*d*) See, in addition to the passages just cited, fr. 4. § 1. D. 8. 1.—fr. 13. D. ibid. (Pomponius) "Si, tam angusti loci demonstratione facta via concessa fuerit, ut neque vehiculum, neque jumentum ea iniro possit, *iter magis, quam via aut actus* acquisitus videbitur; sed si jumentum per eam duci poterit, non etiam vehiculum, *actus videbitur acquisitus.*"—fr. 2. D. 8. 6.

(*e*) fr. 1. pr. fr. 7. pr. D. 8. 3. (quoted note *c*).

(*f*) fr. 8. D. 8. 3. (quoted above, note *c.*)—fr. 13. § 2. 3. fr. 23. pr. D. 8. 3.—fr. 6. in fin. D. 8. 6. See also *Varro* de lingua Latina. 6. 2. and *Hugo*, R. G. p. 190.

(*g*) fr. 13. § 1. D. 8. 3.—fr. 6. § 1. D. 8. 6.—See *Marezoll*, Inst. § 95.

decided by the judge according to equity, respect being had to the locality and to the interests of both parties.[a]—In Germany, in determining the nature and extent of a right of way, little regard is paid to the names and principles which the Romans applied to servitudes of this description; all is made to depend on how, where, and for what purpose they were granted or acquired.[b] Yet the Roman rule of law still holds good, that the greater tacitly comprehends the less.[c] *d.* The *servitus navigandi*, or the right of crossing a lake belonging to another in order to arrive at one's own ground.[d]

B. The right of Pasture.

§ 314. The *right of pasture* (*servitus pascendi s. pascui*) is the right of pasturing one's cattle on another's ground.[e] This right tacitly comprises in itself that of *actus*, in so far as the latter is necessary to its exercise.[f] Its extent, both as regards the time of its exercise and the kind and number of cattle, depends on the special regulations made for this purpose in the grant by which it is conferred. When the parties have made no special agreement concerning it, the following principles must decide:

a. The servitude can be exercised only at the time when fields and meadows are open (i. e. between harvest and seed-time), consequently after the fruits have been gathered and the meadows mowed.[g] *b.* Any kind of cattle for which the pasture is adapted may be turned out on it, but not such as would injure the land to an unusual extent.[h] *c.* All the cattle which belong to the entitled land and can be supported through the winter by its produce, may be turned out on the servient land.[i] *d.* Lastly, the proprietor of the servient ground (unless an *express* agreement be made to the contrary) has a right of joint pasture[k]

(*a*) fr. 13. § 1. 3. D. 8. 3.—fr. 9. D. 8. 1.—In the case of a devise of a right of way, the heir is entitled to determine the direction of the way, if this has not been done by the testator. fr. 26. D. 8. 3.

(*b*) *Sommer* in the Archiv Civ. Prax. Vol. 3. No. 20.

(*c*) fr. 21. fr. 110. pr. D. 50. 17.—pr. J. 2. 3.—fr. 1. pr. fr. 7. pr. D. 8. 3.—fr. 4. § 1. D. 8. 5.—fr. 1. D. 34. 4.

(*d*) fr. 23. § 1. D. 8. 3.

(*e*) § 2. J. 2. 3.—fr. 1. § 1. D. 8. 3. (Ulpianus) "In prædiis rusticis computanda etiam sunt aquæ haustus, pecoris ad aquam appulsus, jus pascendi, calcis coquendæ, arenæ fodiendæ."—fr. 3. pr fr. 4. fr. 6. § 1. D. 8. 3.—*Kämpfe*, Diss. de servitute pascendi. Wittenberg, 1791.—*Strampfer*, Hutrecht. Erlangen, 1798.—*Münter*, Weiderecht. Hanover. 1804.—*Hagemann*, Landwirthschaftsrecht. Hanover, 1807. § 290–316.—C. G. Biener, Quæst. de jure pascendi. Cap. 1–8. 10. 11. 13 seq. 20. 47 seq. and in his Opusc. edited by F. A. Biener. Vol. 2. Nos. 15–17. 19. 21. 26. 42.—*Seuffert*, Beiträge zur Lehre vom Weiderechte. Wurtzburg, 1822.

(*f*) Arg. fr. 3 § 3. D. 8. 3.

(*g*) Arg. fr. 9. D. 8. 1.—fr. 13. in fin. D. 8. 4.—See especially *Kind*, Quæst. for. 1st Ed. Vol. 2. c. 58.

(*h*) *Lauterbach*, Coll. Pand. Lib. 8. tit. 3. § 10. As e. g. swine, sheep, and geese.

(*i*) For the reason that a predial servitude is to be confined to the necessities of the dominant land. (See above, § 307 in fin.)—fr. 3. pr. D. 8. 3. (Ulpianus) "Item sic possunt servitutes imponi, ut et *boves, per quos fundus colitur, in vicino agro pascantur*. Quam servitutem imponi posse, Neratius libro secundo Membranarum scribit."—fr. 5. in fin. D. 8. 3.—See *Wollär* in Klein's Rechtsspr. Vol. 3. No. 3.—*Kind*, l. c. Vol. 4. c. 65.

(*k*) Arg. fr. 13. § 1. in fin. D. 8. 4.—const. 6. C. 3. 34. The jus compascendi is distin-

(called *jus compascendi*), which however is subject to certain restrictions. For, in case the pasture on the servient ground is not sufficient for the cattle of both parties, or ceases to be so, the proprietor of the dominant ground may nevertheless keep at pasture the full number of cattle to which he is entitled by special agreement, even though nothing should be left for the cattle of the servient ground. But if no certain number of cattle has been secured to the dominant ground, it is left for the court to decide what number each may turn out, respect being had to the proportions of stock belonging to each farm.[a]

C. *Rights of Leading and Using Water.*

§ 315. To the servitudes that relate to the conducting and using of water, belong: *a.* The *aquæductus* (*servitus aquæ ducendæ*), i. e. the right of leading water to one's own premises from or at least through another's land, whether beneath, upon, or above the surface of the earth.[b] As a general rule, the entitled party can lead the water only through pipes, and not through stone channels,[c] and he must lead it in a certain direction.[d] The servitude moreover may refer to *aqua quotidiana*, in which case the use of the water is not confined to any period of the year; or only to *aqua æstiva*, where it is restricted to the summer.[e] *b.* The *aquæ haustus*, or the *servitus aquæ hauriendæ*, i. e. the right of drawing water from another's spring or well, in which the *iter*, as far as it is necessary to the servitude, is tacitly contained.[f] *c.* The *servitus pecoris ad aquam appulsus*, or the right of leading one's cattle to water on the servient ground, in which the *actus*, as far as requisite, is tacitly implied.[g] *d.* The *servitus aquæ educendæ*, or the right of leading off the water from one's own on to another's ground.[h]

D. *Various other Predial Servitudes.*

§ 316. There are a great many other predial servitudes which occur in the Roman law, as e. g. the right of cutting wood in another's forest; the right of laying up and keeping the produce of one's ground in a

guished from the now so-called jus compascui. By the former is understood that right of reciprocal pasturing which several owners grant to each other with respect to their lands. It does not, however, always occur as a servitude, but often as a mere precarium. *Hagemann*, l. c. § 300–304.

(*a*) *Kind*, l. c. Vol. 1. c. 48. Vol. 4. c. 66.—*Hagemann*, l. c. § 301.

(*b*) pr. J. 2. 3.—fr. 1. pr. fr. 9. D. 8. 3.—fr. 14. § 2. D. 8. 1.—fr. 4. D. 43. 20.—Cod. 11. 42.—*Winckler*, Diss. de jure impetratæ aquæ. Leipsic, 1749. and in his Opusc. minor. Vol. 2. P. 1. p. 1.—*Hermann*, Diss. de servitute aquæductus. Leipsic, 1803.

(*c*) fr. 17. § 1. D. 39. 3.

(*d*) The direction is determined here on the same principle as in the rights of way. fr. 9. in fin. D. 8. 1.—fr. 21. 22. 26. D. 8. 3.—fr. 8. D 43. 20.

(*e*) fr. 1. § 2. 3. D. 43. 20. The use of water may also be limited by days, hours, and measure. fr. 2. fr. 5. pr. D. ibid.—fr 2. § 1. D. 8. 3.

(*f*) § 2. J. 2. 3.—fr. 1. § 1. fr. 3. § 3. fr. 9. D. 8. 3.—*Walch*, Diss. de aquæ hauriendæ servitute. Jena, 1754.

(*g*) See the passages cited in last note and fr. 4. fr. 6. § 1. D. 8. 3.

(*h*) fr. 29. D. 8. 3.—fr. 8. § 5. D. 8. 5.

building belonging to one's neighbour; the right, in working one's quarry, to cast earth, stones, and pieces of rock on one's neighbour's ground, and to leave them there until they can be taken away; the right of having a hut on another's ground, for the purpose of exercising the right of pasture;[a] the *jus cretæ eximendæ, calcis coquendæ, lapidis eximendi, arenæ fodiendæ*, and the like,[b] which are sufficiently explained by their names.

TITLE THIRD.

ORIGIN AND TERMINATION OF SERVITUDES.

I. Of their Origin.

1. With respect to the Grantor.

§ 317. As servitudes are in their nature nothing else but single rights detached from the ownership and granted to another (§ 291), it follows: 1. That only the true owner of a thing can burthen it with a servitude. Accordingly, if it be conferred by one who is not the true owner, the grantee acquires not the *jus servitutis* itself, but only the *possessio*.[c] 2. One whose ownership in a thing is revocable from the beginning (*dom. revocabile ex tunc*), cannot burthen it with a servitude for any time longer than the duration of his right.[d] 3. A predial servitude, owing to its indivisibility, cannot be imposed on land held jointly by one of the several joint owners.[e] 4. And even a sole owner, if he holds the mere right of ownership in a thing (*nuda proprietas*), and the right of usufruct belongs to another, can grant no other servitudes with respect to the thing than such as will not impair the usufruct: and no servitude by which the usufruct would become restricted, can be imposed by him upon the thing, even though the usufructuary should consent to it.[f] 5. An owner who has only a

(*a*) fr. 6. § 1. D. 8. 3.—fr. 3. § 1. 2. D. ibid.—fr. 6. in fin. D. ibid.

(*b*) § 2. J. 2. 3.—fr. 1. § 1. fr. 5. § 1. fr. 6. D. 8. 3.

(*c*) fr. 11. § 1. D. 6. 2. (quoted above, p. 251. note *f*.)—Comp. also § 237. § 243. No. 2. and § 244. note *a*.

(*d*) fr. 11. § 1. D. 8. 6.—fr. 105. D. 35. 1. For here the rule applies: Resoluto jure concedentis, resolvitur jus concessum. See above, § 261.

(*e*) fr. 2. D. 8. 1.—fr. 11. 34. pr. D. 8. 3.—fr. 6. § 1–3. fr. 18. D. 8. 4. This, however, does not refer to *personal* servitudes, for a joint-owner may e. g. grant a usufruct on his share, fr. 10. D. 7. 9.; nor does it mean to exclude the case where one who admits another as a joint-owner, reserves a servitude to himself. fr. 8. § 1 D. 8. 1.

(*f*) fr. 15. § 7. in fin. D. 7. (Ulpianus) "*Proprietatis dominus ne quidem consentiente fructuario servitutem imponere potest;*" fr. 16 D. ibid. (Paulus) "Nisi qua deterior fructuarii conditio non fiat; velati si talem servitutem vicino concesserit, jus sibi non esse altius tollere."—The reason is, there can be no servitude of a servitude (servitus servitutis esse non potest), as has been stated above, § 295. On the different interpretations of the passages quoted, see: *Glück*, Comm. Vol. 9. p. 42 seqq. As the grant of a servitude which would impair the rights of a usufructuary, would imply a servitus servitutis, it will be perceived that even the consent of the usufructuary cannot render it valid. *Baumann*, Diss. de servitute a proprietatis domino fundo fructuario imposita. Leipsic, 1789.—*Schöman*, Handb. des

so-called *dominium utile* over the thing, as e. g. the emphyteuta and superficiarius (§ 325. note *a*), may indeed establish servitudes on the thing without the consent of the dominus; but such servitudes become extinct whenever the thing reverts to the dominus.[a]

2. With respect to the Recipient.

§ 318. A personal servitude may be acquired by any one who has the general capacity of acquiring rights; but a predial servitude can be acquired only by the true owner of the ground, because it is to be regarded as an accession to the ground.[b] 2. An owner who holds the mere right of proprietorship (*mera s. nuda proprietas*) in a thing may indeed acquire a servitude for it without the consent of the usufructuary; but then the usufructuary has the advantage of it as long as the usufruct lasts.[c] 3. A joint-owner cannot acquire a servitude in favour of the joint-property for himself alone; because he is not proprietor of the whole, and because a servitude from its indivisibility cannot be acquired *pro parte*.[d] 4. Where the owner of a piece of ground causes a servitude to be established for himself and his neighbour likewise, its acquisition, as the Roman law ordains, has effect only with respect to himself.[e]

3. With respect to the various Titles.

§ 319. Servitudes may be acquired: 1. By *agreement*. Thus much at least is settled, that negative servitudes may be acquired by agreement without any thing further. But whether agreement by itself is sufficient to create an affirmative servitude, so as to establish the *jus servitutis* and therewith the real action for enforcing it, or whether a *quasi-traditio* of the servitude, i. e. an exercise of the same *patientiâ domini*, is requisite in addition thereto – is a question much disputed.[f] 2. By *devise* (*servitus legata*), where the *jus servitutis* is acquired ipso jure in

Civ. R. Vol. 1. p. 383.—*Zachariä* in Hugo's Civ. Mag. Vol. 2. p. 348.—*Schnelle*, Diss. de probabili interpretatione legum 15. 16. and 17. pr. D. de usufructu. Rostock, 1825.—The best history of this doctrine is given in *Glück's* Comm. Vol. 9. p. 42 seqq. Comp. *Marezoll*, Progr. qua explicantur Ulpiani et Pauli verba in fr. 15. § ult. et fr. 16. 17. D. 7. 1. Leipsic, 1839.

(*a*) fr. 1. pr. D. 7. 4.—fr. 1. § 9. D. 43. 18. According to the feudal law, this applies also to the vassal. II. F. 8. pr.

(*b*) § 3. J. 2. 3.—fr. 1. § 1. D 8. 4. Hence a bonæ fidei possessor of a piece of land can acquire nothing more than a bonæ fidei possessio of the servitude granted to him respecting it.

(*c*) fr. 15. § 7. D. 7. 1.—fr. 1. pr. fr. 5. § 1. D. 7. 6.

(*d*) fr. 19. 34. pr. D. 8. 3.—fr. 5. fr. 6. § 1–3. fr. 18. D. 8. 4.—fr. 8. § 1. D. 8. 1.—fr. 30. § 1. D. 8. 2.

(*e*) fr. 5. fr. 6. pr. in fin. fr. 8. D. 8. 4.—fr. 64. D. 18. 1. But, as will be seen from p. 174. note *c.*, this is no longer the case.

(*f*) According to the common opinion, a tradition of the servitude, granted by agreement, is necessary to the acquisition of a jus servitutis; i. e. a quasi-traditio of the servitude (viz. an actual exercise of the servitude unopposed by the owner) must follow the agreement, in order to complete the acquisition. const. 20. C. 2. 3. (quoted above, p. 286. note *d.*)—fr. 11. § 1. D. 6. 2. (quoted above, p. 251. note *f.*)—fr. 20. D. 8. 1. (quoted p. 251. note *f.*)—fr. 1. § 2. D. 8. 3.—According to another opinion, such tradition is not necessary for the acquisition of the jus servitutis

the moment when *dies legati cedit*.[a] An agreement or testament is to be understood as tacitly granting a servitude, if this be essentially necessary to the subsistence of the thing alienated or devised, or for the exercise of the principal right conferred.[b] 3. By *adjudication* in the three actions of division,[c] and by the judicial grant of a necessary right of way.[d] 4. By *prescription* of ten or twenty years; provided the thing

itself, but only for acquiring possession of the servitude, and for establishing a right to the Publiciana in rem actio. *Gaius*, II. 30. 31.—§ 4. J. 2. 3.—§ 1. J. 2. 4.—fr. 3. pr. D. 7. 1. (quoted above, p. 251. note *e*)—fr. 19. D. 8. 3. Those who maintain this opinion insist that fr. 11. § 1. D. 6. 2. (quoted p. 251, note *f*.)—fr. 20. D. 8. 2. (quoted ibid.) and fr. 1. § 2. D. 8. 3. support their views. This opinion was first adopted by *Savigny*, in his Besitz. p. 527. 550, and defended at large by *Schmidlein*, Diss. de servitutibus per pactum constituendis. Gottingen, 1823. (See also his article in the Archiv Civ. Prax. Vol. 9. p. 145.); and afterwards by *Michelsen*, Archiv Civ. Prax. Vol. 8. p. 362.—*Hasse* in Rhein. Mus. Vol. 1. p. 64.—*Schrader* in the Tüb. Krit. Z. Vol. 1 No. 2. p. 66.—*Warnkönig*, Archiv Civ. Prax. Vol. 12. p. 52. and in the Thémis. Vol. 10. p. 57. The opposite opinion is defended by *Du Roi* in the Archiv Civ. Prax. Vol. 6. p. 284.—*Zimmern*, ibid. Vol. 7. p. 309. and in Schunck's Jahrb. Vol. 2. p. 19.—and likewise by *Francke*, Civ. Abh. p. 129. See also, *Hærtel* de servitutibus per pacta et stipulationes constitutis ex jure Romano. Leipsic, 1828.—Dr. Rosshirt thinks that the acquisition of servitudes should be subjected to the same rules which apply to the acquisition of ownership and which had already been applied to the acquisition of servitudes granted by devise. *Rosshirt*, Vermächtnisse. II. p. 177 seqq. To this the Editor adds, that it is an established rule, that the alienator of a thing can reserve to himself a servitude on it, provided he makes the reservation at the moment of tradition. It is also an established rule, that at least negative servitudes can be acquired by simple agreement. As regards affirmative servitudes, the opinion most generally adopted is, that a quasi-traditio (i. e. an exercise of the servitude *patiente domino*) is requisite for completing the acquisition.—It is not settled whether *destination* as a mode of establishing a servitude was known to the Romans. By destination is meant the title under which a servitude arises, when an owner of two adjoining estates has so used them as to establish a customary relation between them, which follows them on their being transferred to separate owners. This mode of establishing a servitude is recognised by the French Civil Code. Art. 692–4. and by the Civil Code of Louisiana, Art. 763–5. Dr. Rosshirt is of opinion that, although many jurists have regarded this mode of establishing a servitude as of Roman origin, and it has been adopted in the French Civil Code as derived from the Roman law, yet there is nothing in the Civil law to warrant it. See Rosshirt's Z. Vol. 2. No. 3. But however this may be, it seems equitable enough that such a right should be recognised

(*a*) § 4. J. 2. 3.—§ 1. J. 2. 4.—fr. 3. pr. D. 7. 1. —fr. 6. pr. D. ibid. Still, a tradition of the servitude is necessary here also, in order to found a usucapio and the actio Publiciana. —See on the servitus legata in general, titt. Dig. 33. 2. and 3.

(*b*) fr. 1. D. 33. 3.—fr. 1. § 1. 4. D. 7. 6.—fr. 15. § 1. D. 33. 2.—fr. 44. § 9. fr. 81. § 3. D. 30.—fr. 20. D. 8. 5. compared with fr. 10. fr. 34–39. D. 8. 2.—fr. 3. fr. 6. pr. fr. 7. D. 8. 4.—fr. 30. D. 7. 1.—fr. 26. D. 39. 2.—*Westphal* de servitutibus. § 541.—*Glück*, Comm. Vol. 9. p. 70. 77–82.

(*c*) fr. 6. § 1. D. 7. 1.—(Gaius) "Constituitur adhuc ususfructus et in *judicio familiæ herciscundæ et communi dividundo*, si judex alii proprietatem adjudicaverit, alii usumfructum."—fr. 16. § 1. fr. 22. § 3. D. 10. 2.—fr. 6. § 10. D. 10. 3.—fr. 10. D. 7. 9. (quoted above, p. 322. note *a*.)—*Puchta*, Klagen. § 87 seq.

(*d*) fr. 12. pr. D. 11. 7. (Ulpianus) "Si quis sepulchrum habeat, viam autem ad sepulchrum non habeat, et a vicino ire prohibeatur, Imperator Antoninus cum patre rescripsit, *iter ad sepulchrum peti precario et concedi solere*, ut, quoties non debetur, impetretur ab eo, qui fundum adjunctum habeat. Non tamen hoc Rescriptum, quod impetrandi dat facultatem, etiam actionem civilem inducit: sed extra ordinem interpelletur. Præses etiam compellere debet *justo pretio iter* ei *præstari*, ita tamen, ut judex etiam de opportunitate loci prospiciat, ne vicinus magnum patiatur detrimentum."—This passage speaks only of a necessary right of way to a burying place; but, by way of analogy, this decision has been extended in practice to all cases of a necessary right of way.—fr. 1. § 1. D. 7. 6. (Idem) "Ususfructus legatus adminiculis eget, sine quibus uti frui quis non potest, et ideo si ususfructus legetur, *necesse est tamen, ut sequatur eum aditus*; usque adeo, ut si quis usumfructum loci leget ita, *ne heres cogatur viam præstare, inutiliter hoc adjectum videtur*. Item si usufructu legato iter ademtum sit, *inutilis est ademtio*, quia semper sequitur usumfructum."—fr. 44. § 9. D. 30. (Idem) "Si duos fundos habens testator alterius mihi usumfructum, alterum Titio leget, aditum mihi legatarius non debebit, sed heres cogetur redimere aditum et præ-

servient is one the ownership of which can be acquired by prescription within these periods;[a] provided also that the prescriber is in good faith;[b] and lastly, provided that he can prove a *justus titulus*, i. e. that the servitude has been established in a lawful manner.[c] A *bona fide* prescriber who is unable to show a *justus titulus*, will acquire the servitude after thirty years,[d] or by immemorial prescription (*vetustas*);[e] one without *bona fides* can never acquire the *jus servitutis* itself, although the expiration of the owner's *actio negatoria* may entitle him to defend his possession of the servitude, by means of the exception of limitation.[f]

stare."—fr. 15. § 1. D. 33. 2.—(Marcellus) "Qui duos fundos habebat, unum legavit, et alterius fundi usumfructum alii legavit. Quæro: si fructuarius ad fundum aliunde viam non habeat, quam per illum fundum, qui legatus est, an fructuario servitus debeatur? Respondi: quemadmodum si in hereditate esset fundus, per quem fructuario posset præstari via, secundum voluntatem defuncti videretur id exigere ab herede, ita et in hac specie non aliter concedendum esse legatario fundum vindicare, nisi prius jus transeundi usufructuario præstet, ut hæc forma in agris servetur, quæ vivo testatore obtinuerit, sive donec ususfructus permanet, sive dum ad suam proprietatem redierit."—*Glück*, Comm. Vol. 9. p. 101.—*Elvers* in the Themis. Vol. 1. p. 73. The three last cited passages rest on the general principle that the grant of a servitude includes all such accessories as are necessary to its enjoyment (adminicula servitutis).

(*a*) const. 12. in fin. C. 7. 33. "Eodem observando, etsi res non soli sint, sed incorporales, quæ in jure consistunt, veluti *ususfructus et ceteræ servitutes*." This passage shows that the late Prof. *Zimmern* was mistaken when he denied (in his Römisch-rechtliche Untersuchungen. No. 5.) that servitudes can be acquired by prescription. Contra: *Du Roi* in the Archiv Civ. Prax. Vol. 6. p. 287. With respect to those things the property of which can be acquired only by a prescription of 30 or 40 years or longer (see §§ 278. 282.), the same length of time is requisite in order to acquire a servitude by prescription.—Nov. 131. c. 6. "Pro temporalibus autem decem et viginti et triginta annorum præscriptionibus, solam quadraginta annorum præscriptionem sanctissimis ecclesiis ceterisque omnibus venerabilibus locis opponi præcipimus. Atque id ipsum observetur etiam in exactione legatorum et hereditatum ad pias causas relictarum."

(*b*) This implies of course, that he had exercised the servitude nec vi, nec clam, nec precario. fr. 10. pr. D. 8. 5.—fr. 1. § 23. D. 39. 3.—const. 1. C. 3. 34. Still he is not required to prove it, but his adversary has to show the contrary.

(*c*) const. 12. C. 7. 33.—According to the view taken by our Author in the text, and by *Thibaut*, System. 7th Ed. § 1031. a servitude established by a malæ fidei possessor of the servient land without the true owner's knowledge, could be acquired only by a prescription of thirty years. This, however, is not correct, as has been since admitted by Thibaut himself: for, in order to acquire a servitude by prescription, the laws require only that it shall have been exercised for 10 or 20 years in good faith (non vi, non clam, non precario); and hence a justus titulus, or a knowledge on the part of the true owner of the servient land, is not at all requisite. Comp. *Unterholzner*, l. c. Vol. 2d. p. 189 seqq.

(*d*) Arg. const. 8. § 1. C. 7. 39. But see the last preceding note.

(*e*) fr. 3. § 4. D. 43. 20.—fr. 10. pr. D. 8. 5.—fr. 2. pr. § 8. D. 39. 3.—fr. 28. D. 22. 3. (The preceding passages will be found quoted above, p. 299. note *e*.)—const. 1. C. 3. 34.—cap. 26. X. 5. 40. (quoted above, p. 300. note *l*.)—cap. 1. de præscript. in 6to. (2. 13.) (quoted p. 299. note *a*.)—The provision concerning the aquæ pluviæ arcendæ actio, is nothing but a singular exception to the general rule.

(*f*) const. 3. const. 8. § 1. C. 7. 39.—Respecting the nature and requisites of acquisitive prescription of servitudes, opinions greatly differ. Comp. *Galvanus* de usufructu. cap. 12.—*Thibaut*, Verjährung. § 14. 36.—*Dabelow*, Verjährung. Vol. 1. p. 349.—*Glück*, Comm. Vol. 9. § 629.—*Löhr* in his Mag. Vol. 3. No. 3.—*Zimmern* and *Neustetel*, Röm. rechtl. Unters. p. 102. 336. (Contra: *Thibaut* in the Archiv Civ. Prax. Vol. 5. p. 323.)—*Seckendorf* in the Archiv Civ. Prax. Vol. 4. p. 83.—*Seuffert*, Erörterungen. II. p. 59.—*Hagemann*, Pract. Erört. Vol. 7. No. 91. Vol. 8. No. 32.—*Wening*, Civ. R. Vol. 1. § 154.—*Hasse* in the Rhein. Mus. Vol. 2. p. 394. — *Unterholzner*, Verjährungslehre. Vol. 2. § 187–216 — *Schweppe*, Röm. Priv. R. Vol. 2. § 305.—*Bessel* in the Archiv Civ. Prax. Vol. 13. p. 380. *Hofman* in his and Fuhr's Versuche. No. 1.—*Fritz* zu Wening. p. 381.—Many jurists are of opinion that in order to acquire a servitude, no other than ordinary prescription is requisite. — Concerning the acquisition of *servitutes discontinuæ* (§ 322), see *Müller's* Diss.: num et quatenus continua possessio requiratur in juribus discontinuis præscriptio ne constituendis. Leipsic, 1832.

5. Servitudes are also granted by the law itself, as is often the case with the right of usufruct.[a] *Predial servitudes* might likewise be said to be granted by law, were it not incorrect to apply this term to the general restrictions imposed by law upon one person's property, for the benefit of another (§ 286).

II. Termination of Servitudes.[b]

§ 320. When neither a *dies ad quem* nor a *conditio resolutiva*[c] has been specified by agreement or by law with respect to the termination of servitudes, the latter according to their nature will become extinct: 1. By *renunciation* (*remissio*) on the part of the entitled party, which may be either express or implied.[d] 2. By *confusion*. This occurs in predial servitudes, when both pieces of ground become the property of one owner; but the servitude continues, if only a part of the dominant or servient ground falls to the one or the other of the *two owners*.[e] Personal servitudes will also cease by confusion, when either the *dominus proprietatis* himself reäcquires the usufruct, or when the usufructuary acquires the proprietorship also, which latter case is more usually called a *consolidatio*.[f] A confusion, however, which from its beginning is merely temporary, will not terminate the servitude for ever; for on its cessation, the servitude revives.[g] 3. By the *termination of the grantor's right*, where this was revocable from the beginning (*dom. revocabile ex tunc*).[h] 4. By the *destruction of the servient object*;[i] yet, if the

(*a*) The single cases of the grant of a usufruct by law, are: the father's usufruct in the peculium adventitium of his children; the usufruct of the widow in the estate which her children inherit from their father; the usufruct of the conjux binubus in the estate of the surviving children of the first marriage, whether it be inherited from their parent or from a deceased brother or sister.

(*b*) Dig. 7. 4. and 8. 6.—*Pauli* sent. rec. III. 6. § 28–33. — Buchholtz, Versuche. No. 17.

(*c*) Thus the usufruct granted to a father in the estate of his children ceases with his paternal power. § 2. J. 2. 9. In like manner the commencement of a servitude created by agreement or devise, may be made to depend upon a certain condition, or it may be limited to a certain time. fr. 4. pr. D. 8. 1. With respect to the usufruct, however, the following provisions have been made by const. 12. C. 3. 33.: 1. In case the usufruct has been devised so as to terminate when a third person shall arrive at a certain age, and this person dies before reaching that age, the usufruct shall, nevertheless, continue until the time when he would have reached that age, unless the usufructuary himself dies in the meantime. 2. In case the testator has made the term of the usufruct to depend on some other uncertain event concerning the person of another, and this person dies before the occurrence of the event, the usufruct shall be considered as one granted for the lifetime of the usufructuary.

(*d*) § 3. J. 2. 4. (quoted above *p. 326. note a.*) —fr. 14. § 1. D. 8. 1.—fr. 8. D. 8. 6.—fr. 64. D. 7. 1. (quoted above, *p. 332. note b.*)—fr. 65. D. ibid. (quoted above, *p. 332. note a.*)—fr. 34. pr. D. 8. 3.— *Fritz* in the Archiv Civ. Prax. Vol. 8. No. 15.

(*e*) fr. 1. D. 8. 6. (Gaius) "Servitutes prædiorum *confunduntur*, si idem utriusque prædii dominus esse cœperit."—fr. 30. D. 8. 2. compared with fr. 8. § 1. D. 8. 1.—fr. 19. fr. 34. pr. D. 8. 3.—fr. 5. fr. 6. § 1–3. fr. 18. D. 8. 4.

(*f*) § 3. J. 2. 4. (quoted p. 326. note *a.*)—fr. 3. § 2. fr. 6. pr. D. 7. 2.—fr. 76. § 2. D. 23. 3.—fr. 7. pr. D. 23. 5.—fr. 17. D. 7. 4.—fr. 57. pr. D. 7. 1. and thereon: *Bülow*, Abh. Vol. 2. p. 109.

(*g*) fr. 9. D. 8. 5.—fr. 18. D. 8. 1.—fr. 57. D. 24. 3.—fr. 7. pr. D. 23. 5.

(*h*) fr. 16. D. 7. 4.—fr. 11. § 1. D. 8. 6. (quoted p. 271. note *a.*)—fr. 105. D. 35 1. (quoted ibid.) In accordance with the rule: Resoluto jure concedentis resolvitur jus concessum. See *Fritz* in the Archiv Civ. Prax. Vol. 8. p. 286.

(*i*) § 3. J. 2. 4. (quoted p. 326. note *a.*)—fr. 10. § 2. D. 7. 4. (Ulpianus) "Agri vel *loci* usufructu legato, si fuerit inundatus, ut stagnum

servient thing be restored, the former servitude revives.[a] 5. By the *extinction of the entitled subject.* Thus personal servitudes expire with the death of the party entitled,[b] and predial servitudes with the destruction of the dominant land, though here also the servitude revives with the restoration of the dominant estate.[c] 6. By *limitation.* According to the later Roman law, however, a continued non-exercise (*non-usus*) of the servitude does of itself no longer constitute a limitation; so that in all servitudes, personal as well as predial, the right[d] is not lost by non-user, unless either the proprietor of the servient thing acquires its freedom from the servitude by prescription (*usucapio libertatis*), or a third party acquires the thing as a free property by prescription.[e]

jam sit aut palus, *procul dubio extinguetur.* § 3. Sed et si stagni ususfructus legetur, et exaruerit sic, ut ager sit factus, mutata re ususfructus extinguitur. § 4. Non tamen, si arvi ususfructus legetur, et ibi vineæ sint positæ, vel contra, puto extingui. Certe silvæ usufructu legato, si silva cæsa illic sationes fuerint factæ, sine dubio ususfructus extinguitur."—fr. 12. D. ibid. (Idem) "Si cui balnei ususfructus legatus sit, et testator habitationem ex hoc fecerit, vel si tabernæ, et diætam fecerit, dicendum est, usumfructum extinctum. § 1. Proinde et si histrionis reliquerit usumfructum, et eum ad aliud ministerium transtulerit, extinctum esse usumfructum dicendum erit."—fr. 30. D. ibid. (Gaius) "Cato et corium mortui pecoris in fructu non est, quia mortuo eo ususfructus extinguitur."—fr. 31. D. ibid. (Pomponius) "Cum gregis ususfructus legatus est, et usque eo numerus pervenit gregis, ut grex non intelligatur, perit ususfructus."—fr. 20. § 2. D. 8. 2.—fr. 2. D. 7. 1.

(*a*) fr. 14. pr. D. 8. 6. (quoted above, p. 232. note *b*.)—fr. 23. D. 7. 4. (quoted ibid.)—fr. 36. pr. D. 7. 1. Many understand this as applying only to predial servitudes; but see fr. 23. here cited.

(*b*) § 3. J. 2. 4. — pr. J. 2. 5. — fr. 3. § 3. D. 7. 4.—const. 3. pr. const. 12. pr. const. 14. C. 3. 33. A servitude granted to a corporation becomes extinct at the end of a hundred years. fr. 56. D. 7. 1. (Gaius) "An usus fructus nomine actio municipibus dari debeat, quæsitum est. Periculum enim esse videbatur, ne perpetuus fieret, quia neque morte, nec facile capitis demiuutione periturus est; qua ratione proprietas inutilis esset futura, semper abscedente usufructu. Sed tamen placuit, dandam esse actionem. Unde sequens dubitatio est: quosque tuendi essent in eo usufructu municipes. Et placuit, *centum annos* tuendos esse municipes, *quia is finis vitæ longævi hominis est.*" It is remarkable that the ususfructus and usus, being founded solely on the jus civile, became extinct also when the party entitled suffered a capitis deminutio maxima or media. This was not the case with habitatio, nor with operæ servorum. § 3. J. 2. 4. (§ 296.)—fr. 1. D. 7. 4.—const. 16. 17. C. 3. 33.—fr. 10. pr. D. 7. 8. (Ulpianus) "Si habitatio legetur, an perinde sit atque si usus, quæritur. Et effectu quidem idem pæne esse legatum usus et habitationis et Papinianus consensit libro octavo decimo Quæstionum. Denique donare non poterit, sed eas personas recipiet, quas et usuarius. Ad heredem tamen nec ipsa transit, nec non utendo amittitur, nec capitis deminutione."—fr. 10. D. 4. 5. (Modestinus) "Legatum in annos singulos vel menses singulos relictum, vel si habitatio legetur, morte quidem legatarii legatum intercidit, *capitis deminutione tamen interveniente perseverat*, videlicet *quia tale legatum in facto potius, quam in jure consistit.*"—fr. 2. D. 7. 7. (Ulpianus) "Operæ servi legatæ capitis deminutione *non* amittuntur."—fr. 1. D. 33. 2.

(*c*) fr. 20. § 2. D. 8. 2.

(*d*) For the actio confessoria expires, according to the general rules of limitation of actions, in 30 years. const. 3. C. 7. 39.

(*e*) We must distinguish here between the older and the later law. I. As to *personal* servitudes, the usufructus and usus (but not the habitatio) were lost, according to the older law, by mere non-user; this took place in the case of immoveable things in two years, and in the case of moveable things in one year. *Pauli* sent. rec. III. 6. 30. "*Non utendo* amittitur ususfructus, si possessione fundi biennio fructuarius non utatur, vel rei mobilis anno."—fr. 38. 39. D. 7. 1. (quoted p. 331. note *c*.)—fr. 40. D. ibid. (Marcianus) "Quod si donavero, non alias retineo, *nisi ille utatur.*" fr. 28. D. 7. 4. (Paulus) "Si ususfructus alternis annis legetur, constat, non posse non utendo eum amitti, quia plura sunt legata."—See also fr. 29. ibid.—fr. 10. pr. D. 7. 8. (quoted above, note *b*.)—Yet according to the later ordinance of Justinian, the usufruct and usus are no longer extinguishable by mere non-user; but in order to their extinction, it is presupposed that they are reacquired by a usucapio libertatis on the part of the owner of the res fructuaria, or that the thing has been prescribed for by a third person as free property.—const. 16. § 1. in fin. C. 3. 33. "Nisi talis exceptio usufructuario opponatur, quæ, etiamsi dominium vindicaret, posset eum præsentem vel absentem excludere."

TITLE FOURTH.

ACTIONS RELATING TO SERVITUDES.

I. Petitory Actions.[a]

§ 321. Actions that occur with respect to servitudes are either *petitory* or *possessory*. To petitory actions belong:

1. The *actio confessoria* (*s. vindicatio servitutis,*) which is used for enforcing a servitude. It may be instituted by him who can prove

— const. 13. C. 3. 34. "*Sicut usumfructum, qui non utendo per biennium in soli rebus, per annale autem tempus in mobilibus vel se moventibus diminuebatur,* non passi sumus hujusmodi sustinere compendiosum interitum, sed ei decennii vel viginti annorum dedimus spatium, ita et in ceteris servitutibus obtinendum esse censuimus, *ut omnes servitutes non utendo amittantur non biennio,* quia tantummodo soli rebus annexæ sunt, *sed decennio contra præsentes, vel viginti spatio annorum contra absentes,* ut sit in omnibus hujusmodi rebus causa similis, explosis differentiis." Many however, finding it impossible to obtain that sense from the passages referred to, maintain that the usufruct still becomes extinct by mere non-user. *Rosshirt*, Gem. Deutsch. Civ. R. II. § 293. No. 2. And it must be admited that, in const. 16. cited above, Justinian, who transforms the former prescriptive extinction of 1 and 2 years into one of 10 and 20 years, speaks (as will be seen from the use of the terms præsens and absens) of nothing but the expiration of the 10 and 20 years—and by no means of the usucapio libertatis. II. Respecting the *predial* servitudes, a distinction was made in the older law between servitutes prædiorum rusticorum and servitutes prædiorum urbanorum. The former were lost by mere non-user, the latter only by usucapio libertatis.—*Pauli* Sententiæ receptæ. I. 17. § 1. "Viam, iter, actum, aquæductum, *qui biennio usus non est, amisisse videtur; nec enim ea usucapi possunt, quæ non utendo amittuntur,* § 2. Servitus hauriendæ aquæ vel ducendæ *biennio omissa intercidit, et biennio usurpata recipitur.*"—fr. 6. D. 8. 2. (Gaius) "Hæc autem jura, *similiter ut rusticorum quoque prædiorum,* certo tempore *non utendo pereunt,* nisi quod hæc dissimilitudo est, quod non omnimodo pereunt non utendo, *sed ita, si vicinus simul libertatem usucapiat.* Veluti si ædes tuæ ædibus meis serviant, *ne altius tollantur, ne luminibus mearum ædium officiatur,* et ego per statutum tempus fenestras meas præfixas habuero vel obstruxero, ita demum jus meum amitto, si tu per hoc tempus ædes tuas altius sublatas habueris; *alioquin, si nihil novi feceris, relineo servitutem.* Item si tigni immissi ædes tuæ servitutem debeant, et ego exemero tignum, ita demum amitto jus meum, si tu foramen, unde exemtum est tignum, obturaveris, et per constitutum tempus ita habueris; *alioquin, si nihil novi feceris, integrum jus meum permanet.*—fr. 18. D. 8. 3. (quoted above, p. 336, note *d.*)—fr. 7. D. 8. 6. (Paulus) "Si sic constituta sit aqua, ut vel æstate ducatur tantum, vel uno mense. quæritur, *quemadmodum non utendo amittatur?* quia non est continuum tempus, quo, quum uti non potest, non sit usus. Itaque et si alternis annis vel mensibus quis aquam habeat, *duplicato constituto tempore amittitur.* Idem et de itinere custoditur. Si vero alternis diebus, aut die toto, aut tantum nocte, *statuto legibus tempore amittitur,* quia una servitus est. Nam et si alternis horis vel una hora quotidie servitutem habeat, Servius scribit, *perdere eum non utendo servitutem,* quia id, quod habet, quotidianum sit." According to the later law, however, as contained in const. 13. in fin. C. 3. 34. const. 16. § 1. C. 3. 33. and § 3. J. 2. 4., predial servitudes do not expire by mere non-user. This opinion of Mackeldey seems to be erroneous; for although negative servitudes and servitutes urbanæ do not expire by mere non-user, yet affirmative servitudes do terminate by non-exercise, without requiring a usucapio libertatis.—See especially *Galvanus* de usufructu. cap. 41.—*Mallinkrott*, Diss. de præscriptione servitutum extinctiva. Jena, 1788.—*Siertsema* de usufructu ob non usum amittendo. Groningen, 1812.—*Glück*, Comm. Vol. 9. § 641. Vol. 10. § 689.—*Gros*, Geschichte der Verjährung. p. 62 seqq.—*Thibaut*, Verjährung. § 58.—*Dabelow*, Verjährung. Vol. 2. § 172.—*Seuffert*, Erört. II. p. 71.—*Unterholzner*, Verjährung slehre. Vol. 2. § 217–234.—*Schweppe*, Röm. Priv. R. Vol. 2. § 309–311.—*Buchholtz*, Versuche. No. 17. p. 193.—*Rosshirt*, Gem. Deutsch. Civ. R. Vol. 2. § 293. With regard to the prescription of servitudes, the exercise of which is limited to certain times, see: const. ult. pr. C. 3. 34. *Unterholzner*, l. c. p. 231.—Concerning the extinction of the *ususfructus alternis annis*, see: fr. 28. D. 7. 4.—Mere abuse of th: right does not terminate the servitude, though it may subject the party to an action for damages.

(*a*) Dig. 7. 6.—8. 5.—§ 2. J. 4. 6. (quoted above, p. 308. note *c.*)—*Donelli* Comm. jur. civ. Lib. 11. c. 15. 16.—*Glück*, Comm. Vol.

that the servitude he claims, actually belongs to him or to his land.[a] It can be brought against every one who disturbs the plaintiff in the exercise of his right, and the latter can obtain thereby a judicial recognition of his right of servitude together with a compensation for damages, and, if need be, a *cautio de non amplius turbando*.[b]

2. The *actio negatoria* (*s. vindicatio libertatis*), which is employed by the proprietor for maintaining the freedom of the thing from a servitude claimed by the defendant.[c] This action is in fact nothing else but the *rei vindicatio* applied to remedy a *partial* infringement of the rights of ownership as contained in the assumption of a servitude;[d] hence it has for its object to procure the judicial recognition of the natural freedom of the thing, and to obtain security against future disturbance and compensation for damage.[e] As to the distribution of the burthen of proof, it behooves the plaintiff to prove his ownership,[f] and the defendant to give evidence of his right of servitude, even though he be in possession of it.[g]

3. As the rights of ownership may be enforced by the *Publiciana in rem actio* instead of the *rei vindicatio* (§ 288–290), so in like manner a servitude or the freedom from a servitude may be enforced by the *Publiciana in rem actio* instead of the *actio confessoria* or *negatoria*. The principal advantages which the *Publiciana actio* offers to the plaintiff, are

10. § 685–687.—Comp. also *Löhr* in his Mag. Vol. 3. p. 304.—*Du Roi* in the Archiv Civ. Prax. Vol. 6. p. 295.—*Puchta*, Klagen, § 81–86.

(*a*) fr. 2. § 1. D. 8. 5. (Ulpianus) "*Hæc autem in rem actio confessoria nulli alii, quam domino fundi, competit;* servitutem enim nemo vindicare potest, quam is, qui *dominium* in fundo vicino habet, cui servitutem dicit deberi." With respect to the right of the usufructuary to enforce servitudes belonging to the land of which he holds the usufruct, see: fr. 1. pr. fr 5. § 1. D. 7. 6.—fr. 1. § 4. D. 43. 23.—*Bilow*, Abh. Vol. 2. No 4.

(*b*) fr. 2. D. 7. 6. (Pomponius) "Si ab herede ex testamento fundi usufructus petitus sit, qui arbores dejecisset, aut ædificium demolitus esset, aut aliquo modo deteriorem usumfructum fecisset aut servitutes imponendo, aut vicinorum prædia liberando, ad judicis religionem pertinet, ut inspiciat, qualis ante judicium acceptum fundus fuerit, *ut usufructuario hoc, quod interest, ab eo præstetur.*"—fr. 5. § 5–7. D. ibid.—fr. 4. § 2. D. 8. 5.—fr. 6. § 2. D. ibid. (quoted p. 322. note *c*.)—fr. 6. § 3–7. fr. 10. § 1. fr. 12. fr 15. D. ibid.—Comp. Editor's note to § 288.

(*c*) fr. 2. pr. D. 8. 5. (Ulp.) "De servitutibus in rem actiones competunt nobis ad exemplum earum, quæ ad usumfructum pertinent, tam confessoria, quam negatoria; confessoria ei, quis servitute sibi competere contendit, *negatoria domino, qui negat.*" It may also be employed by the owner to secure himself against other similar intrusions. —fr. 14. D. ibid. (Pomponius) "Si, quum meus proprius esset paries, passus sim te immittere tigna, quæ antea habueris, si nova velis immittere, prohiberi a me potes; immo etiam agere tecum potero, *ut ea, quæ nova immiseris, tollas.* § 1. Si paries communis opere abs te facto in ædes meas se inclinaverit, potero tecum agere, *jus tibi non esse parietem illum ita habere.*"—fr. 6. § 2. D. 47. 7. (Idem) "Si arbor in vicini fundum radices porrexit, recidere eas vicino non licebit; *agere autem licebit, non esse ei jus, sicuti tignum, aut protectum, immissum habere.* Si radicibus vicini arbor alatur, tamen ejus est, in cujus fundo origo ejus fuerit."—fr. 13. 17. pr. D 8. 5.

(*d*) *Heise*, Grundriss. Vol. 2. cap. 2. note 14. Of another opinion is *Du Roi*, in the Archiv Civ. Prax. Vol. 6. p. 297.—Contra: *Puchta* in the Rhein. Mus. Vol. 3. p. 166.—*Spangenberg* in Hagemann's Pract. Erört. Vol. 8. Div. 2. No. 2.

(*e*) See the passages cited in note *b*.

(*f*) fr. 5. pr. D. 7. 6.—fr. 15. D. 39. 1. See on the last passage: *Göschen*, Grundriss. p. 103.

(*g*) Still this is not by any means settled. The passages on which the controversy chiefly rests are § 4. J. 4. 15 and fr. 7. § 3. D. 40. 12. The opinion adopted in the text, and which prevails pretty generally in prac-

the following: viz. 1. That the plaintiff who employs it to enforce a servitude is not required to prove that the *jus servitutis* actually belongs to him, but only that he has acquired the *servitutis possessio* by tradition or *patientiâ domini*; 2. That the plaintiff who uses it for enforcing the freedom of the thing is not required to prove that the ownership of the same actually belongs to him, but only that he has acquired possession of the thing *ex justa causa* by delivery.[a]

II. Possessory Actions.

§ 322. With respect to the possessory remedies which apply to servitudes, we have to observe: A. That the usual *interdicta retinendæ* and *recuperandæ possessionis* (§§ 253, 254) apply to personal servitudes.[b] B. That as to *predial* servitudes, we must keep up the distinction between affirmative and negative servitudes: 1. In the case of negative servitudes, the *interdictum Uti possidetis* is the only one that can be employed;[c] 2. In the case of those affirmative servitudes which stand in immediate connexion with the possession of another piece of ground (*servitutes continuæ*),* as e. g. *servitus oneris ferendi et tigni immittendi*,

tice, is defended by *Kind*, Quæst. for. 2d Ed. Vol. 3. c. 44.—*Thomasius* de onere probandi in actione negatoria. Halle, 1716. § 18 seqq.—*Hufeland*, Beiträge. IV. 10.—*Borst*, Beweislast. p. 132–148.—*Weindler*, Vermuthungen. Landshut, 1809.—*Löhr* in his Mag. Vol. 3. (1.) p. 508.—*Veltheim*, Actio confessoria et negatoria. Kiel, 1822.—*Esser*, Beweislast bei den Servitutenklagen. Treves, 1826.—*Mittermaier* in the Archiv Civ. Prax. Vol. 19. No. 2.—The opposite opinion is maintained by, *Weber* in his Klagen und Einreden. II. 16.—*Pfeiffer*, Vermischte Aufsätze. p. 207.—*Schlitte*, Diss. num mota actione negatoria reus in poss. servit. constitutus ab onere probandi immunis sit. Helmstedt, 1808.—*Seuffert*, Erörterungen II. 16. —*Thibaut*, System. 7th Ed. § 625. and *Braun* thereon.—*Glück*, Comm. Vol. 10. § 687.—*Klötzer*, Beweislast bei der actio confessoria und negatoria. Jena, 1813.—*Rauschenplat*, Diss. de onere probandi in negatoria actione. Gottingen, 1830.—*Puchta*, Klagen. § 86.—*Heffter* in Weber's Beweisführung. 2d Ed. Halle, 1832. p. 233 seqq.

(*a*) fr. 11. § 1. D. 6. 2.—fr. 1. § 2. D. 8. 3.—fr. 4. § 7. D. 8. 5.—fr. 18. D. 20. 1.—But comp. also p. 349. note *c*.

(*b*) fr. 4. D. 43. 17.—fr. 3 § 13. 14. 16. *fr. 9.* § 1. D. 43. 16.—fr. 60. pr. D. 7. 1.—fr. 2. pr. § 3. D. 43. 26.

(*c*) fr. 8. § 5. D. 8. 5.—Concerning these interdicts, see in general: *Savigny*, Besitz. § 45 seq. and *Puchta*, Klagen. § 89–93.

* The distinction which is made in predial servitudes between *servitutes continuæ* and *discontinuæ*, usually means that a *servitus continua* is one whose exercise, when once begun, continues without interruption (e. g. *serv. oneris ferendi*); while a *serv. discontinua*, on the contrary, is one which requires for its exercise a new act each time (e. g. *servitus viæ, actus, pascendi*, &c.). Sometimes, however, the distinction indicates that by *serv. continua* is meant one which, although subject to interruptions, can at least be exercised at any time (*serv. viæ, itineris*, &c.); while by *serv. discontinua* is meant one which can be exercised only at certain times, e. g. in the spring and autumn (*jus pascendi*, &c.)—*Negative* servitudes (*servitutes quæ in non faciendo s. omittendo consistunt*) embrace all those predial servitudes which begin with a negative (*non, ne*), or where the right of the holder of the servitude consists merely in this, that the proprietor of the servient thing can make no use of certain rights which naturally belong to him; *affirmative* servitudes (*quæ in patiendo consistunt*) are those predial or personal servitudes in which the proprietor, contrary to the right of exclusion he would otherwise possess, must submit to the performance of certain acts on the part of the holder of the servitude. (See above, § 295.)

the *interd. Uti possidetis* will also apply;[a] while in those affirmative servitudes which are exercised by single independent acts (*servitutes discontinuæ*), as in the *servitus itineris, viæ, actus, aquæ hauriendæ, de aqua quotidiana et æstiva, de rivis*, &c., the interdicts specially provided for them must be employed.[b] Such special interdicts are: the *interdictum de itinere actuque privato*, for upholding the exercise of a right of way; the *interd. de itinere actuque reficiendo*, for protection in repairing a pathway;[c] the *interd. de fonte*, for maintaining the exercise of the right to draw water from another's well or pond; the *interd. de fonte reficiendo*, for protection in repairing a well; the *interd. de aqua quotidiana et æstiva*, for maintaining possession of an aqueduct; and the *interd. de rivis*, for protection in repairing the same.[d]

CHAPTER IV.

EMPHYTEUSIS.

§ 323. It was the custom of the Romans either to divide conquered lands among the citizens, and especially the soldiers, or to convert them into public land (*ager publicus populi Romani*). In general, all provincial lands were subject to the superior ownership of the state and bound to pay a rent to the *ærarium* (treasury), and the provincial or other possessor held such land only *in bonis* (Editor's note to § 258). The lands that fell to the state itself were granted on lease or in perpetuity, and were then called *agri vectigales*, from the word *vectigal* denoting the rent to be paid. The tenant obtained either a personal or a real right; the latter more especially in those cases where the object consisted of waste lands. It must of course have been difficult to find a willing tenant for lands lying waste and uncultivated, or one who would be inclined to expend the necessary labour and capital to bring under cultivation land in which he had no permanent right, and to pay rent for it without some prospect of an adequate return. In order to obviate this difficulty and to promote agriculture, the rights of the tenant of waste lands were extended as far as possible, so as to

(*a*) fr. 20. pr. D. 8. 2.—fr. 8. § 5. D. 8. 5.

(*b*) *Savigny*, Besitz. 6th Ed. § 44, 46. and p. 588. note 2.—*Rosshirt* in the Archiv Civ. Prax. Vol. 8. No. 1. § 4.—*Herwart* in the Z. für Civ. R. und Proc. Vol. 12. Nos. 2. 3.—*Albert*, Besitz unkörperlicher Sachen. Leipsic, 1826.—*Althof*, Das interd. itinere actuque priv. Rinteln, 1836.—But see contra: *Thibaut* in his System. 7th Ed. § 623 seq. 8th Ed. § 769 seq. and in the Archiv Civ. Prax. Vol. 1. No. 7. § 2., who justly maintains that the ordinary possessory interdicts (*Uti possidetis* and *Unde vi*) apply to negative predial servitudes concurrently with the proper special interdicts; that to affirmative predial servitudes the interd. *Uti possidetis* alone applies; and that this is excluded only by the interdictum de cloacis wherever the latter occurs.

(*c*) fr. 1. pr. fr. 3. § 11. D. 43. 19.—fr. 4. § 5. D. 8. 5.

(*d*) Dig. 43. 22.

give him a sort of ownership.[a] This expedient had great effect in encouraging persons to undertake to reduce such lands to cultivation. Afterwards, municipal and ecclesiastical corporations also let out lands belonging to them in a manner similar to emphyteusis; and at length the same was done by private individuals, although of this no instances occur before the time of Constantine. The land in all these cases was called *fundus vectigalis*, and in later times *fundus emphyteuticus*. As the etymology of the word denotes (ἐμφυτεύειν τινὸ, *plant, till; to graft*; and hence generally *to improve*), the relation referred originally to land only; but it was afterwards extended to buildings, and thus is applied, for instance, to mills: it is still however confined to immoveable things. The grant of an emphyteusis is usually founded on a contract. As this contract confers upon the emphyteuta a sort of ownership, it was regarded by many Roman jurists in the light of a contract of sale; but as on the other hand it requires the payment of a yearly rent, others regarded it as a contract of hiring. This controversy between the Roman jurists respecting the nature of the emphyteutical contract was settled by the emperor Zeno, who decided that it was neither the one nor the other, but an independent consensual contract.[b]—In Germany, there are several relations to be met with which greatly resemble the Roman emphyteusis; but as these relations differ from the latter in many essential points, the Roman principles can be analogously applied to them only with a careful discrimination. The German emphyteuta, for instance, is regarded as a *dominus utilis* (Editor's note, p 268 seq.), and he pays generally a much higher rate of canon, which is given rather *in compensationem* than *in recognitionem dominii alieni*, and is consequently remitted in case of a failure of his crops. Besides, the German emphyteuta does not forfeit his right in consequence of the non-payment of the canon, nor is his successor subjected to the payment of a *laudemium*. In those instances, however, where the pure Roman emphyteusis occurs, it is to be treated exclusively on Roman principles. K.

(*a*) const. 1. C. 4. 66. Hence the rent is termed *canon*, and not *merces* as in the case of *locatio conductio*; it is also smaller and unchangeable. It must be observed that the word *emphyteusis* is used in three different acceptations: thus it denotes the contract (*contractus emphyteuticarius*), the right granted to the emphyteuta (*jus emphyteuticarium*), and the thing or estate itself (*bonum s. prædium emphyteuticarium*).

(*b*) The peculiarity of a consensual contract, according to the Roman view, consists in this, that a simple agreement, without any thing further, makes the relation perfect, and consequently entitles to an action for the fulfilment of the contract (here *actio emphyteuticaria*), without any necessity for a written document or previous delivery. But for the acquisition of the right itself a tradition is necessary, except in the case of a devise; many also, on account of the precept in Nov. 7.—pr. Nov. 120. cap. 5., hold that in ecclesiastical emphyteuses a written document is essential. *Thibaut's* opinion that a writing is necessary in every case, cannot be justified by the passages (const. 1. 2. 3. C. 4. 66. —Nov. 120. cap. 5. 6.) to which he refers, nor by any others, although in a legislative point of view it cannot be disapproved of; for in permanent relations of this description nothing can be more important than to have a written instrument to refer to, whenever a

I. Its Nature.

§ 324. *Emphyteusis*[a] is the real right by which a person is entitled to enjoy another's estate as if it were his own, and to dispose of its substance as far as can be done without deteriorating it. This right is conferred on condition that the grantee shall cultivate and improve the estate, and pay yearly, or at some other specified period, a certain tax or rent (*canon, pensio, reditus*) therefor. The proprietor who grants such a right to another is called *dominus emphyteuseos;* he to whom it is granted, *emphyteuta;* and the thing in respect to which it is granted, *ager vectigalis s. emphyteuticarius.*[b]

II. Rights of the Emphyteuta.

§ 325. Although the emphyteuta does not become owner of the thing, yet he has nearly all the rights of an owner.[c] Thus he has:

A. The full *right of enjoyment*, consequently the right of possessing the thing and of reaping all the fruits thereof; and he acquires an irrevocable ownership in the fruits simply by their separation.[d] He

dispute arises between the parties. In most of the German states indeed such written agreements are requisite for establishing an emphyteutical relation.

(*a*) SOURCES: § 3. J. 3. 24. (25.)—Dig. 6. 3. —39 4.—Cod. Theod. 10. 3.—Cod. Just. 4. 66. —LITERATURE: *Cujacii* Recitt. in tit. C. de jure emphyteutico.—*Donelli* Comm. jur. civ. Lib. 9. c. 13–15.—*Jani A Costa*, Præl. in tit. C. de jure emphyteutico.—*Galvanus* de usufr. cap. 27. § 5.—*Madihn* de vera indole agrorum vectigalium secundum juris Rom. doctrinam. Berlin, 1773.—*Groscurd* de jure emphyteutico. Gottingen. 1803.—*Kluppel* de jure emphyteutico. Groningen. 1807. —*Roupp* de jure emphyteutico. Leyden, 1807.—*Faure* de emphyteusi ex jure Romano. Groningen, 1819.—*Glück*, Comm. Vol. 8. § 600–619.—*Gesterding*, Eigenthum. p. 405–444.—*Savigny*, Besitz. p. 99.—*Hufeland*, Geist des R. R. Vol. 2. Div. 2. p. 55.—*Du Roi* in the Archiv Civ. Prax. Vol. 6. p. 386 seqq.—*Nothomb*, Spec. de historia juris emphyteuticis apud Romanos. Liege, 1826. —*Verloben*, Diss. de jure emphyteutico. Utrecht, 1826.—*Tigerström*, Ueber das frühere Verhältniss des Rechts am Ager vectigalis.—Greifswald, 1828.—Idem. Comm. de ordine Digestorum. Berlin, 1829. p. 104.—Comp. also: *Birnbaum*, Die rechtl. Natur der Zehnten. Bonn, 1831. p. 60 seqq.—*Mühler* de jure emphyteutico transferendo. Berlin. 1835.—*Vuy* de originibus et natura juris emphyteutici. Heidelberg, 1838 *Buchholtz* Jur. Abh. No. 25.—*Büchel*, Civilr. Erört. No. 3.

(*b*) With respect to the analogous modern tenures, see in particular: *Buri*, Bauerngüter. Edited and enlarged by J. F. Runde. Giessen, 1789.

(*c*) For this reason and because the Roman law allows the emphyteuta a utilis in rem actio, the glossators called his rights in the thing, *dominium utile;* while the proprietas which remains with the dominus, who as the true owner has the rei vindicatio directa, was called by them *dominium directum*. Dominium utile must not however be understood to signify ownership, but only a jus in re aliena, which in its extent and effects nearly resembles ownership. *C. H. Lang*, Comm. de dominii utilis natura, indole, et historia, ejusque in jure Romano et Germano vestigiis. Gottingen, 1793. The distinction between dominium directum and utile, which has been so frequently misunderstood, is most accurately defined by *Thibaut* in his Versuche. Vol. 2. No. 3. and in his Civ. Abh. No. 11., as also by *Eichhorn*. Deutsch. Priv. R. § 160. The theory of a divided ownership (see Editor's note to p. 268–9) is still erroneously applied to emphyteusis by *Weber*, Handbuch des Lehnrechts Vol. 1. p. 14. and *Glück*, Comm. Vol. 8. § 577. 600.—Comp. *Seuffert*, Erört. Div. 2. No. 1. The peculiar extent of the rights of the emphyteuta is by no means unnatural, as has been asserted; for his rights are no more incompatible with another's being the owner of the thing, than are those of the usufructuary.

(*d*) fr. 25. § 1. D. 22. 1.

acquires indeed no property in the accessions; but he has an emphyteutical right in them.[a] To treasure trove he can lay no claim, except as finder.[b]

B. *The right of disposing of the thing itself.* By virtue hereof the emphyteuta is entitled, in case there is no special provision against it in the grant: 1. To dispose of the substance of the thing, and to make any change in it that will not deteriorate it.[c] 2. To transfer the exercise of his right to another, and to alienate, *inter vivos* or *mortis causa*, the emphyteutical right itself (or, as it is usually called, his improvements, *meliorationes*);[d] whence he is also entitled to mortgage the thing and to burthen it with servitudes, without requiring the consent of the dominus thereto.[e] It is only when he wants to *sell out* his right, that he needs to apply for such consent on the part of the dominus; since the latter has the right of preëmption, if he will give the same as has been offered by a third party. The emphyteuta, therefore, has to inform him of the intended sale; and within two months after such notice, the dominus must declare whether he will make use of his pre-emption right or not. If he make no declaration within that period, the emphyteuta may sell out without his consent, to any person who possesses the qualities requisite for the proper cultivation and management of the emphyteutical estate.[f] 3. The emphyteuta has, as a means of enforcing his right, an *in rem actio utilis* against every possessor, including even the proprietor himself.[g] 4. At the death of the emphyteuta, the emphyteusis, whether ecclesiastical or secular, regularly descend to his heirs.[h]

III. Duties of the Emphyteuta.

§ 326. The emphyteuta, in case nothing particular has been agreed upon, has the following duties to perform: 1. He must bear all pub-

(*a*) Arg. fr. 10. § 1. fr. 32. fr. 65. D. 23. 3.

(*b*) Arg. fr. 7. § 12. D. 24. 3.—*Thibaut*, Civ. Abh. No. 11. note 3. With respect to this, of course those who attribute to the emphyteuta an actual ownership, hold a different opinion, as e. g. *Glück*, l. c. p. 389.; which is also the case with some who regard the right of the emphyteuta as a jus in re, as e. g. *Malblanc*, Principia jur. Rom. § 415. and *Schweppe*, Jur. Mag. No. 1. p. 151.

(*c*) Auth. *Qui rem.* C. 1. 2.—Nov. 120. c. 8.

(*d*) const. 3. C. 4. 66.—§ 3. J. 3. 24. (25.)—fr. 71. § 5. 6. D. 30.—const. 1. 3. C. 11. 70.

(*e*) fr. 16. § 2. D. 13. 7.—fr. 1. pr. D. 7. 4.—*Thibaut*, Versuche. Vol. 2. Treatise 15. No. 1.—*Buchholtz*, Versuche. No. 18.—If, however, the land reverts to the owner, *ex lege constitutionis*, all servitudes and mortgages imposed upon the land by the emphyteuta without the owner's consent terminate, according to the rule, Resoluto jure concedentis, resolvitur jus concessum. fr. 31. D. 20. 1. (quoted above, p. 271. note *a*.). But this is not the case when the owner reacquires the land *jure protimiseos*. *Buchholtz*, Jur. Abh. p. 316. note 25.

(*f*) const. 3. C. 4. 66.

(*g*) fr. 1. § 1. D. 6. 3. (Paulus) "Qui in perpetuum fundum fruendum conduxerunt a municipibus, quamvis non efficiantur domini, tamen placuit, competere *eis in rem actionem adversus quemvis possessorem*, sed et adversus ipsos municipes."—fr. 12. § 2. D. 6. 2. (Idem) "In vectigalibus, et in aliis prædiis, quæ usucapi non possunt, *Publiciana competit*, si forte bona fide mihi tradita sunt."—*Du Roi* in the Archiv Civ. Prax. Vol. 6. p. 389.

(*h*) Nov. 7. c. 3. taken in connexion with

lic burdens and taxes that are imposed upon the thing.[a] 2. He must improve the estate, or at least manage it in such a manner that it shall not be deteriorated.[b] 3. He must pay the rent (*canon*) agreed upon at the time specified, without any previous demand.[c] 4. A new emphyteuta who acquires the emphyteusis not as heir but as a singular successor, whether by gift, devise, exchange or sale, must pay to the dominus for his reception by the latter a sum equal to the fiftieth part of the purchase money, or, in case there was no sale, of the true value of the thing, to be determined by professional persons (*quinquagesima pars pretii vel æstimationis*; now called *laudemium*).[d] Such laudemium needs to be paid only when the dominus has acknowledged his acceptance of the new emphyteuta, and not where he has refused it, and has persisted in his refusal for two months after notice given him.[e]

IV. Acquisition of Emphyteusis.*

§ 327. An emphyteutical right may be acquired: 1. By a *grant* from the true proprietor of the land, whether made by agreement

Nov. 120. c. 6. § 1. — The emphyteutical rights may also be transferred by devise. fr. 71. § 5. 6. D. 30.

(*a*) const. 2. C. 4. 66.—const. 2. C. 10. 16.

(*b*) Nov. 120. c. 8. Hence he is not entitled to demand any compensation for what he has expended in improvements, and he is obliged at all events to deliver up the estate in as good condition as it was in when he received it.

(*c*) § 3. J. 3. 24. (25.)—const. 2. C. 4. 66.—*Thibaut*, Versuche. Vol. 1. Treatise 15. No. 3.

(*d*) const. 3. C. 4. 66. *Voet*, Comm. ad Pand Lib. 6. tit. 3. § 26–35.—*Glück*, Comm. Vol. 8. § 611–614.—*Höpfner*. Comm. 8th Ed. by A. D. Weber. § 906.

(*e*) const. 3. C. cit.—*Buchholtz*, Jur. Abh. p. 318.

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* Emphyteusis is an inheritable and transferable real right, which is granted by the proprietor of an estate to another in consideration of a certain and invariable rent to be paid at the time agreed upon. In virtue of this right, the tenant acquires not only the complete use and enjoyment of the thing, but also a power to dispose of its substance under certain restrictions. Emphyteusis is accordingly distinguished from usufruct by this, that the latter gives mere rights of use, and no rights of proprietorship (hence e. g. neither that of making essential changes in the substance of the thing, nor that of disposing of the right of usufruct *inter vivos* or *mortis causa*); that the usufructuary is only a detentor, while the emphyteuta is a juridical possessor, and as such is not only entitled to petitory and possessory actions, but can mortgage his right and burden the thing with servitudes that are no essential detriment to it; that the usufructuary acquires the fruits only by perception, the emphyteuta on the contrary by mere separation; and that the usufructuary has not to pay any rent to the proprietor, as the emphyteuta has to do. On the other hand, both agree in this, that the usufructuary as well as the emphyteuta must bear the burdens that rest upon the thing, and pay for the necessary repairs. The emphyteuta's rights of proprietorship consist in these: that he can at pleasure effect changes in the substance of the thing, if by so doing he makes it no worse; that on condition of giving notice to the proprietor, on account of his pre-emption right (*jus protimiseos*), he can sell the emphyteusis; that he can dispose of it *inter vivos* or *mortis causa*; and lastly, that he is entitled to make use of a *rei vindicatio utilis*. The Roman emphyteusis might therefore be called a *ususfructus* enlarged in duration and extent, and having attached to it several of the rights of proprietorship.

The burdens that fall on the emphyteuta, besides the payment of public taxes, are the ground-rent to the proprietor, as also, in case of a change in the person of the

accompanied by a delivery of the thing, or by testament. 2. By *prescription* of ten or twenty years, in case the emphyteutical right was originally granted by a non-proprietor, but has been exercised by the emphyteuta *bona fide* during the whole of the term, provided the thing is of such a nature that it can be acquired by prescription in this period (§ 278).[a]

V. Extinction of Emphyteusis.

§ 328. The emphyteutical right becomes extinct: 1. When its object ceases to exist.[b] 2. When the ownership of the grantor terminates from its revocable or temporary nature.[c] 3. When the time arrives or the condition is fulfilled on which the termination of the grant was made to depend. 4. When the emphyteuta surrenders his right to the dominus;[d] or when for other reasons the right of the emphyteuta reverts to the dominus (called consolidation), which *may happen*

(*a*) According to the analogy of the acquisition of servitudes by prescription. See also const. 14. C. 11. 61.—*Unterholzner* is of a different opinion, in his Verjährungslehre. Vol. 2. § 239.—A lapse of the term of prescription is of course not requisite, where the emphyteutical right has been *tacitly* granted by the true proprietor, as e. g. in the case where the latter has accepted payment of canon from a possessor who has held the estate for a length of time *animo emphyteutæ*.

(*b*) § 3. J. 3. 24. (25.) —const. 1. C. 4. 66.

(*c*) In accordance with the rule, Resoluto jure concedentis resolvitur jus concessum, and arg. fr. 11. § 1. D. 8. 6.—fr. 105. D. 35. 1. (quoted above, p. 271. note *a*.) Comp. § 261.

(*d*) It is not settled whether or not an em-

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emphyteuta, the *laudemium*, or two per cent. on the amount of the purchase-money or estimated value of the estate, payable by the successor. Unless it has been otherwise agreed upon, the emphyteuta is bound to notify the proprietor of the intended sale, informing him at the same time of the true price that has been offered him. If the proprietor does not declare his intentions within two months, his silence is equivalent to a renuncintion of his preëmption right, and consequently the emphyteuta can transfer the land to the buyer, provided the latter possesses the ordinary qualities of a capable emphyteuta. Under this supposition the proprietor is obliged, on payment of the two per cent. by the new emphyteuta, to invest him with the possession; and this is considered as tacitly performed, if he has let two months pass away without attending to it.

With regard to the ejection of the emphyteuta (on which see Blackstone's Comm. III. 232 in fine), it must be observed that the emphyteuta does not forfeit his right *ipso jure* by a non-performance of his duties, but only through an action brought by the proprietor. This is the contract action (*actio emphyteuticaria*), by which the proprietor can recover possession of the emphyteutic estate together with all belonging to it (appurtenances and hanging fruits), as also compensation for any damage it may have sustained, and payment of the arrears of canon and taxes. The proprietor is not bound to compensate the emphyteuta for improvements made by the latter, unless he has made greater improvements than he was obliged to do; on the other hand, the proprietor cannot recover any compensation for deterioration of the estate, unless it is injured to an unreasonable extent. The deteriorations and improvements must therefore be compared. As the canon is payable at a certain fixed time (usually in autumn), the maxim here applies: *Dies interpellat pro homine*, i. e. the emphyteuta must pay it without being asked. The delay however is not held to be injurious (*purgatio moræ*), in case the canon is paid any time before an action for it is brought. cap. ult. X. 3. 18.—*Thibaut*. System. § 634.—*Höpfner*, Comm. § 902. The right of ejection is considered as renounced, when the proprietor either expressly or tacitly remits the canon, or else accepts instalments of it.

when the emphyteuta dies without lawful heirs and has not disposed of the estate by last will;[a] or when a *usucapio libertatis* occurs on the part of the *dominus emphyteuseos*. 5. When a third party acquires by prescription the ownership of the emphyteutical estate.[b] 6. Finally, when the emphyteuta forfeits the emphyteusis, as a punishment; and this is the case: *a.* when he wastes the estate;[c] *b.* when he neglects to pay the canon (rent) for two years in the case of an ecclesiastical, or for three years in the case of a secular emphyteusis; or when in either case he allows the public taxes to remain unpaid for three years, or fails to deliver to the dominus the receipts for the payment of the same;[d] and, *c.* when he sells out his emphyteutical right to a third person, without having previously given notice thereof (§ 325) to the dominus.[e] But in all these cases, the *dominus emphyteuseos* cannot expel the emphyteuta on his own authority, but must bring an action for that purpose.[f]

CHAPTER V.

SUPERFICIES.*

I. Its Nature.

§ 329. *Superficies* or *superficium*[g] is the term applied by the Roman law to every thing on the surface of a piece of ground or of a building, and which is so closely connected with it by art or nature as to consti-

phyteuta is at liberty to abandon the estate. const. 3. C. 11. 61.—In practice he is permitted to do so. *Glück*, Comm. Vol. 8. p. 532.

(*a*) *Fritz*, who maintains another opinion (see Archiv Civ. Prax. Vol. 8 p. 29. note 23.), says it should fall to the fiscus as a bonum vacans.

(*b*) *Unterholzner*, l. c. Vol. 2. § 241. The emphyteuta himself cannot acquire the estate by prescription as a free property through a continued non-payment of the canon. const. 7. § 6. C. 7. 39.

(*c*) This is to be ascertained from a view of the whole of the premises and not of a single part. Nov. 120. c. 8.—Comp. fr. 13. § 5. D. 7. 1. (quoted above, p. 330. note *b.*) and *Thibaut*, Versuche. Vol. 2. Treatise 15. No. 2.

(*d*) const. 2. C. 4 66.—Nov. 7. c. 3. § 2.

(*e*) const. 3. C. ibid.—cap. 4. X. 3. 18.

(*f*) *Donelli* Comm. jur. civ. Lib. 9. c. 15.

(*g*) SOURCES: Dig. 43. 18.—LITERATURE: *Donellus*, l. c. cap. 16–18.—*Buri*, Comm. über das Lehnrecht. Ed. by Rundo. 2d Div. p. 570.

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* *Superficies*, or *superficium*, properly signifies the surface or every thing connected with the surface of a piece of ground: in legal language, however, it denotes the things connected with the surface of *another's* ground as its accessory parts, and especially a real right in them which is granted to a person (*jus in re aliena*) As we have seen in § 267 seqq., the dominus of the principal thing acquires the accessory things connected with it, according to the principle, *Accessorium sequitur suum principale*; and thus the owner of the soil acquires all that is sown or planted in it, and all that is built upon it (*solo cedit quod solo vel implantatur vel inædificatur*). Yet of course the dominus is not prevented from granting to another a real right in that which is already connected with the soil or which is to be placed thereupon. Such a right is termed a *jus superficiarium* or right of surface.

The superficies usually occurs where a plot of ground (*area*) for the erection of a

tute a part of the same, as e. g. houses, trees, and vines.[a] According to the principles already laid down (§268), the proprietor of the soil, by virtue of accession, has also the ownership of every thing belonging to the superficies,[b] in the sense in which it is used above; but he may grant to another (called the *superficiarius*) a *jus superficiarium* therein, by means of which he tranfers to the latter almost all his rights as owner of the superficies.[c] The superficiary right may be

Dittmar, Diss. de superfici ei notione. Leipsic, 1810.—*Du Roi* in the Archiv Civ. Prax. Vol. 6. p. 386.—*Gesterding*, Eigenthum. p. 444–456.—*Rosshirt* in his Z. Vol. 2. No. 3. p. 402.

(*a*) fr. 32. D. 23. 3.—fr. 39. D. 31.—fr. 2. D. 43. 18.

(*b*) *Gaius*, II. 73–75.—*Caius*, Inst. epitome. Lib. 2. tit. 1. § 4.—fr. 3. § 7. D. 43. 17.—§ 29–31. J. 2. 1.—fr. 2. D. 43. 18.

(*c*) This is another case to which the distinction between dominium directum and utile is erroneously referred by many civilians, e. g. *Hüpfner*, in his Comm. Ed. by Weber. § 292.—Comp. *Thibaut*, System. 7th Ed. § 626. § 629. and *Braun* thereon, p. 475 seq.

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building, and a permanent real right in and for the use of the same, are transferred by the proprietor to another, for which no recompense is due unless it be specially agreed upon by the parties; so that the rent (*solarium*) in this case is by no means essential. Moreover, the superficies applies not only to houses, but also to stables, walls, &c., and even to a single story of a house (e. g. a story to be erected on the top of another's building, to be used as a telegraph, observatory, &c.), or a place for vines to run over another's ground or be trained up another's wall, and in general to all cases where something is permanently connected with an immoveable thing belonging to another, in such a manner that, according to the principles of accession, it must enter into and remain in the ownership of the proprietor of the soil.—*Thibaut*, System. 7th Ed. § 626. The transaction by which the superficies is established may be a sale, a *locatio conductio*, a donation, or any other; although it seems to have been granted among the Romans most commonly in a manner greatly resembling the emphyteutical relation. The passages in the Corpus Juris which speak of a superficies as established by an ordinary lease for years, have led to many errors respecting the nature and extent of the right of superficies. But it must be readily perceived that the superficies, wherever it is created by such a temporary lease, cannot assume the character of a real *right*, but merely that of a personal right as belonging to a hirer.

The supposition that superficies is not to be reckoned among the servitudes, for the reason that it owes its origin to the Prætorian Edict, is erroneous; for the emphyteusis which is nearly related to it, although it had its origin in the civil law, is also not reckoned among the servitudes. The reason lies rather in the nature and extent of the superficies itself. Superficies, like emphyteusis, contains rights of proprietorship, which is not the case with servitudes: for the superficiary has in regard to the surface almost all the rights of an owner—he can alter or destroy the thing erected thereon (e. g. pull down the house), or sell it, or burthen it with servitudes and mortgages. But he has not the right of vindication which belongs to the *dominus soli*, who vindicates the whole; because the accessories and the principal thing are juridically regarded as one. Still he is entitled to petitory actions for the enforcement of his right, and to possessory remedies for the protection of his possession. With respect to the former, he can make use of a *vindicatio utilis* (and consequently of the *Publiciana actio*) against every possessor of the thing, for the purpose of compelling a surrender of it; he is likewise entitled to the *familiæ herciscundæ actio* and the *actio de communi dividundo*, and also to the *actio confessoria* and *negatoria* on account of servitudes attached to the superficies or claimed on it unjustly. With respect to the possessory remedies, he has the interdict *Unde vi*, when he has been forcibly dispossessed; and for his protection while in possession he has the interd. *de superficibus*. fr. 12. § 3. D. 6. 2.—fr. 1. § 5. D. 43. 16.—D. 43. 18.—*Huber*, Præl. Vol. 1. p. 147. Vol. 3. p. 1465.—*Thibaut*, l. c. § 627.

granted in consideration of a ground-rent (*solarium, pensio*), although this is here not as essential as the canon is in the case of an emphyteusis. Such a *jus in superficie* commonly occurs with respect to buildings on another's soil; and sometimes the object of the superficies consists of only a single story of a house.[a]

II. Rights and Duties of the Superficiary.

§ 330. The *rights* of the superficiary are for the most part the same as those of the emphyteuta.[b] 1. He has consequently the full right of use in the superficies, as far as the latter has been granted to him.[c] 2. His right descends to his heirs in case he dies intestate. 3. He may dispose of it in any manner, either *inter vivos* or *mortis causa*.[d] He may mortgage[e] the superficies or subject it to a servitude[f] for the term of his right. 5. He has a *utilis in rem actio* for the enforcement of his right,[g] and a special *interdictum de superficiebus* for the protection of his possession.[h]

His *duties* are: to bear all the burdens and taxes laid upon the superficies,[i] and to pay a ground-rent (*solarium*); if such be the agreement.[k] Moreover, on the redelivery of the thing, the superficiary is not responsible for such deterioration as it may have suffered by age or accident without his fault; neither is his successor required to pay a laudemium, in the case of a transfer.

III. Acquisition and Termination of the Superficies.

§ 331. A *jus in superficie* may be acquired in either of the following ways: 1. By *agreement:* and thus it may be effected, *a.* by the owner's giving permission to another, to erect a building on the land and to possess the same *jure superficiario*; *b.* or by granting to another a

(*a*) fr. 3. § 7. D. 43. 17.

(*b*) *Buchholtz*, Jur. Abh. No. 25.

(*c*) fr. 1. pr. D. 43. 18.

(*d*) fr. 10. D. 10. 2.—fr. 1. § 7. D. 43. 18. The owner of the soil has no preëmption right, and hence the superficiary need not inform him of the contemplated sale.

(*e*) fr. 16. § 2. D. 13. 7.—fr. 9. § 1. D. 20. 1. (Gaius) "Quod emtionem venditionemque recipit, *etiam pignorationem recipere potest.*"—fr. 15. D. 20. 4. (Paulus) "*Etiam superficies in alieno solo posita pignori dari potest*; ita tamen, ut prior causa sit domini soli, si non solvatur ei solarium."

(*f*) fr. 1. § 9. D. 43. 18.—*Buchholtz*, l. c. p. 316.

(*g*) fr. 1. § 3. D. 43. 18. (Ulpianus) "Quod ait Prætor: '*si qua alia actio de superficie postulabitur, causa cognita dabo,*' sic intelligendum est, ut, si ad tempus quis superficiem conduxerit, negetur ei in rem actio. Et sane causa cognita ei, qui non ad modicum tempus conduxit superficiem, *in rem actio competet.* § 4. Is autem, in cujus solo superficies est, *utique non indiget utili actione, sed habet in rem*, qualem habet de solo. Plane si adversus superficiarium velit vindicare, dicendum est, exceptione utendum in factum data; nam cui damus actionem, eidem et exceptionem competere, multo magis quis dixerit."—fr. 74. D. 6. 1.—fr. 12. § 3. D. 6. 2.

(*h*) fr. 1. pr. D. 43. 18.—fr. 3. § 7. D. 43. 17. In order to recover possession which he has lost, he has to employ the usual interd. de vi and de precario. fr. 1. § 5. D. 43. 16.—fr. 2. D. 43. 26.—*Savigny*, Besitz. § 47.

(*i*) According to the familiar rule, *Qui habet commoda. debet ferre onera.*—fr. 7. § 2. D. 7. 1. (quoted above. p. 331. note *e*).

(*k*) fr. 39. § 5. D. 30.—fr. 15. D. 20. 4. (quoted in note *d*.)—fr. 73. § 1. fr. 74. 75. D. 6. 1.

superficies already existing;[a] *c.* or by the owner's reserving a superficies to himself, on the sale of his property.[b] 2. By *last will* (*superficies legata*).[c] A superficies cannot be acquired by prescription.

The *jus in superficie* becomes extinct from the same causes as the emyhyteusis, excepting that here the principles that relate to the deprivation of emphyteusis (§ 328. 6.) do not apply.[d]

CHAPTER VI.

RIGHTS OF PAWN AND MORTGAGE.

History of their Origin.

1. In General.

§ 332. In that low state of a people's civilization, where the barter of commodities is confined to the mere giving of some other *special* equivalent for the thing or service required, the right of pawn and mortgage can occur only in the form of a conditional transfer of property; and in fact this seems to have been among all nations the original form of pledging. For a pawn or mortgage, properly so called, is not a right in a thing itself regarded in its physical identity, but rather in the money value of the thing. And hence it is not until the invention of money as the universal measure of value and medium of exchange, that, a right of pawn and mortgage (a *pignus* or *hypotheca*) can be conceived of as a conditional and restricted right of property in the *money value* of a thing which is owned by another.[e] The right of pawn and mortgage, as a basis of public credit, is of the greatest importance, as it affords the creditor the means of securing his claims against the heedlessness and bad faith of the debtor; and the developing and perfecting of this right have been the principal means of softening that severity exercised upon the person of the debtor[f] which is to be met with in the early history of the laws of all nations.

K.

(*a*) fr. 73. § 1. fr. 74. D. 6. 1.—fr. 1. § 1. D. 43. 18.

(*b*) fr. 44. § 1. in fin. D. 44 7. The buyer in this case becomes *owner* also of the surface ("superficies transit, quæ natura solo cohæret"), although the owner still retains a jus in superficie.

(*c*) Our Author argues from fr. 26. D. 41. 3. that a superficies cannot be acquired by prescription. But this passage, it seems to us, does not speak of a jus superficiarium, but simply of the ownership in the surface. According to *Thibaut's* opinion (see his System. 7th Ed. § 1032.), a superficies can be prescribed for within the same length of time that is required for the acquisition of servitudes by prescription.

(*d*) Some are of opinion that these principles do apply in case he neglects to pay the solarium; but their view is not supported by the passage to which they refer, viz. fr. 15. D. 20. 4.

(*e*) *K. S. Zachariä*, Vierzig Bücher vom Staate. 3d. Vol. p. 145 seq.

(*f*) A remnant of this rigorous personal responsibility is still to be found in the arrest and imprisonment of debtors on bills of exchange in most of the countries of Europe.

2. Among the Romans.

§ 333. The *hypotheca*, or we shall usually term it the *right of mortgage*, was not originally to be found among the Romans. The first germ from which it was developed, was the *fiducia*, that is, an imaginary *sale* or imaginary transfer of ownership, subject to a right of redemption.[a] It was a natural consequence of the then rude state of credit, that whoever wished to procure money, but was unwilling to make an actual and irrevocable sale of his property, was obliged, by way of furnishing security, to make an imaginary or conditional sale of it, i. e. in such manner that he could redeem it. The *fiducia*, which was known to the Romans before the time of the Twelve Tables, was sometimes termed *mancipatio*, or *in jure cessio sub lege* (i. e. *sub conditione*) *remancipationis*, and also *mancipatio sub fiducia*. This roundabout way of furnishing security, besides its inconvenience, must have exposed the vendor not only to great difficulties in recovering his property, but also to the risk of entirely losing it; since he had to trust to the good faith (*fiducia*) of the purchaser for its restoration. With regard to moveables, it needed but a short step in advance, to dispense with this imaginary sale altogether, and instead thereof to give the creditor *possession* of the moveables, with power, in case of non-payment, to keep them as his own (*lex commissoria*) or sell them. But this mere possession, being at first protected by the prætor only by means of an exception, did not furnish the creditor with sufficient security, until a *utilis in rem actio* was introduced for the enforcement of his rights. As immoveable things do not so easily admit of an actual delivery of possession, the expedient was adopted of regarding the possession of them as actually transferred to the creditor for his security. It was easy and natural for the Romans to resort to this supposition; because they were not acquainted with any juridical distinc-

For other debts, personal arrest has been for the most part abolished. The propriety of retaining it for bills of exchange, or at least for mercantile letters of exchange, is generally defended by the European law writers (see e. g. *Mittermaier*, Deutsch. Priv. R. 6th. Ed. II. §§ 324. 353). But this opinion seems subject to grave objections, for it is not the prospect of personal arrest that insures circulation to a bill of exchange. Summary proceedings, which admit of no other exceptions than such as can be proved on the spot, and a prompt execution of the judgment, would certainly afford a satisfactory juridical basis for the credit of bills of exchange. It is true that in the course of mercantile transactions there is no opportunity of obtaining security by means of a pledge, while it is here in particular that a reliable credit is indispensably necessary. But whether these considerations can justify a degree of severity wholly irreconcilable with our present notions of personal freedom, is a question that can easily be answered; since experience has sufficiently shown, that arrests for bills of exchange, while they are expensive to the creditor, prove in most cases ineffectual as a means of compulsion, besides leading to many great evils and abuses. If it be admitted as an undeniable fact that the fear of punishment causes no sensible diminution of crime, it may be as safely asserted that the fear of arrest will never convert roguish or defaulting debtors into honest and punctual payers.

(a) *Gaius*, II. 59. 62. — *Hugo*, R. G. Vol. 1. p. 232. 540 seq.—*Marezoll*, Institutionen. p. 193 seq.

tion between moveable and immoveable things (§§ 258. 293), and because the actual possession of the latter is from their very nature not required in order to secure the rights of the mortgagee. This imaginary transfer of possession to the creditor seems to have been introduced among the Romans about the time of Cicero,[a] and to have been borrowed from the Greeks, as is inferred from its name, *hypotheca*.[b] The *fiducia* was now soon supplanted, and in the times of the emperors it had lost all its practical importance, although single instances of it occurred during that period, as appears from some passages in the Pandects. As to the juridical conception of *pignus* and *hypotheca*, the Romans subjected them to equal principles; so that there was no difference between them as regards their requisites and effects,[c] except such as arises in the case of *pignus* from the possession held by the pawnee.[d] Although this uniform treatment of all corporeal things, without any distinction with regard to moveable and immoveable, is certainly well worthy of our approbation, yet in another respect the Roman system of pawn and mortgage is very defective. We allude to the want of any public control over mortgages laid on real estate, and which is so indispensably necessary for promoting and securing credit on things pledged, and for protecting the purchaser of real estate. This want of a means of ascertaining the true condition of a property was in itself a great evil; but it was rendered still worse by the fact that a spurious equity had led to the introduction of a host of rights of pawn and mortgage, which were originated by the law itself (*hypotheca tacita s. legatis*),[e] or which extended over the whole estate of a debtor (*hypotheca generalis s. omnium bonorum*), or which were privileged as to priority (*hypotheca privilegiata*). K.

(*a*) *Hugo* (R. G. Vol. 1. p. 543.) considers the time of its introduction as doubtful. But every thing seems to favour the supposition that Cicero's contemporary, *Servius Sulpicius*, was the prætor who first gave the non-holding mortgagee a *vindicatio* against every actual possessor of the mortgaged property (*actio Serviana*).

(*b*) The words ὑποτιθέναι and ὑποθήκη signified originally nothing more than *pignorare* and *pignus*; but when adopted by the Romans, they had already been long used by the Greeks as technical terms applied to simple pledging, without possession.

(*c*) Hence *Marcian* says in fr. 5. § 1. D. 20. 1. "Inter pignus autem et hypothecam tantum nominis sonus differt."

(*d*) Whence it arises, that things not yet in existence may form the object of a mortgage, but not of a pawn; that the mortgagee, in order to enforce his right, must bring an action against the debtor to compel the surrender of the thing, which of course is not the case with the pawnee; and that the pawnee enjoys the advantage of retaining the thing, as security for other claims which have no connexion whatever with the pawn.

(*e*) The so-called tacit rights of pawn and mortgage often arose without the knowledge of other parties interested; the priority also, in the case of concurrent rights of pawn and mortgage, was not made to depend on their age alone. He who a second time mortgaged or disposed of a thing already mortgaged, without making the previous mortgage known to the second mortgagee or purchaser, could indeed be punished; but that of course did not always make good the damage that had been inflicted. Again, a third party who acquired a thing belonging to an estate on which another held a general mortgage, even if such mortgage had been granted privately, could be sued by the mortgagee for its redelivery. All these regulations, as will clearly be seen, are most objectionable. Comp. *Hugo*, R. G. pp. 542. 926. 1121.

3. Modern Pawn and Mortgage.

§ 334. The system of mortgage which now prevails in Europe has been constructed on a different plan from that of the Romans. Modern legislatures perceived that the Roman law of mortgage, with its endless complexity, its insufficient security to the creditor, and its inequitable rules of priority, was far from being fully adapted to the state of things under which we live; and this led them to devise new systems, by which the rights both of the creditors and purchasers of property might be better secured. One of the chief improvements thus introduced was to establish a mode of giving publicity to mortgages, as a means of ascertaining at any moment the true condition of an estate. This regulation could not be carried into effect with regard to pawns, and indeed it was not necessary that it should, since the delivery of possession is of itself a sufficient security to the creditor.* The mode of publicity which has been adopted by most legislatures consists in registering the mortgages in public books kept for this purpose in every district. In France, these registers are under the care of the "bureaux de conservation des hypothèques;" in Germany they are usually kept by inferior courts, by whom the mortgage presented for record is entered after a previous investigation of the matter (*causâ cognitâ*). Such a registry requires of course the debtor's consent, which is not always to be presumed from the mere granting of a right of mortgage, unless the law of the particular state recognises no other mortgages than those which are registered. K.

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* With regard to the pledging of moveable things, it may be observed that many of the German governments have established public pawn-houses in the principal towns. Their design in so doing was to put a stop to the usury and frequent disputes occasioned by private pledging, and to furnish temporary relief in cases of distress, on easy terms and in such a manner that none need feel ashamed to avail themselves of it. In the countries where such establishments exist, no pawn-broker's licences are granted to private individuals. The principal business of these pawn-houses is to make loans on pawns; but they also grant loans on the security of real estate. Their rate of interest is very low; some of them requiring only six per cent. on pawns, and five per cent. on mortgages. They are also in the habit of taking capital which is offered to them, and giving in return certificates of debt bearing interest, with coupons attached. Articles of all kinds are received, excepting such as are of too trifling a value or of a perishable nature. The article offered to pawn is valued by a sworn officer according to certain established rules, and a pawn-house ticket is given for it, which entitles the holder to demand it back again on repayment of the loan with interest. It is usual to give the loan for six months, at the end of which time it may be renewed. In the case of very small sums, on account of the trifling amount of interest, a month which is begun is reckoned as complete. If the pawnor neglects to redeem the article or to renew his ticket, the thing is sold (after waiting some months) at the next pawn-house auction, and the pawnor receives the surplus, if there is any. The holder of this ticket is at liberty to dispose of it in any manner he pleases; but no one is allowed to lend money on it. The pawn-house acquires a right of pawn in the thing as soon as the ticket is

§ 335. In the law of mortgage as established by modern legislation, the two following systems may be distinguished:

A. In the first, the principles of the Civil law, and especially its general and legal rights of pawn and mortgage, are retained; with only this alteration, that in conventional mortgages the registered have the preference over the unregistered.

B. In the second, only special mortgages are recognised, and these are required to be registered. Hence under this system, which entirely abandons the Roman general and legal rights of pawn and mortgage, all mortgages are *special* and *public*, i. e. they are specially registered for a *certain* debt and on a *certain* thing. In consequence of adopting the principles of specialty and publicity, great changes have been effected in the law of mortgage. Thus a mortgage not specially entered can be enforced, according to the modern laws, only against the debtor, and not also against a third possessor; again, *the right of* priority of a mortgage depends entirely upon its comparative date of registration. In like manner, a mortgage covers interest only in case the principal sum is entered as bearing interest, and even then it bears interest only for a limited time; while according to the Roman law, the right of pawn and mortgage extends over all interests not illegal. Furthermore, by this modern system, the third possessor is not entitled to the Roman *exceptio excussionis* against the *actio hypothecaria* brought to enforce a registered mortgage.

The latter of these two systems is by all means preferable to the former, especially so when it requires that the records should likewise indicate all the real rights and burdens that apply to a thing, and settle the title of possession. For it promotes real credit in an admirable manner, on the one hand by securing the real estate and increasing the facilities of the proprietor, and on the other hand by furnishing the creditor the means of informing himself of the true state of the property and protecting him in his rights. Neither of these systems however has found, except in a few countries, an

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delivered, even though it be a stolen article; except where it must or could have been known to be stolen either by private information from the party who has been robbed or by advertisements in the public newspapers, in which case the officer who received the stolen goods, or who neglected to record a notice of it in the book kept for the purpose, is liable for the damage that ensues.

There can be no doubt that establishments of this nature can render great service to the community by affording temporary relief to the modest poor or to families who have been suddenly reduced to want; but it is not by any means necessary that they should be undertaken by the state itself. Any incorporated company entitled to public confidence and adopting liberal regulations, would answer the purpose perfectly well; and thus a business rendered disreputable by the mode in which it is often carried on, may be converted into an institution beneficial to the whole community.

unconditional adoption; and as to the latter of them, it is for the most part made illusory, by retaining a number of general and tacit mortgages, as e. g. those of wives and minors, of the state and corporations for public taxes, of children on the property of their father on account of an estate left to them by their deceased mother, &c.*

K.

TITLE FIRST.

GENERAL NATURE OF MORTGAGES.[a]

I. Definition.

§ 336. A right of pawn or mortgage (*pignus, hypotheca, obligatio rei*) is that real right[b] in another's property which is granted to a creditor for the purpose of securing to him his claim, so that in case of necessity he may

(*a*) SOURCES: *Gaius*, 46. 2. §§ 59–61.— *Pauli* Sent. rec. 2. 13.— Dig. XX. — Cod. VIII. 14–35. — LITERATURE, of the *older* law: *Conradi*, Diss. I. II. de pacto fiduciæ. Helmstedt, 1732 and '33; and in his Script. minor. Edited by Pernice. Halle, 1823. Vol. 1. p. 177.—*Trierbach*, Historia juris civ. de pignoribus. Sect. 1. Leipsic, 1814.—*H. A. Zachariä*, Comm. de fiducia. Gotha, 1830.— *Stass* de contractu fiduciæ. Liege, 1824.— Of the *later* law: *Donelli* Comm. jur. civ. Lib. 9. cap. 20. and his Comm. ad Cod. Lib. 8. tit. 14–35; in his Works. Vol. 9. p. 1009. (*Donelli* Tract. de pignoribus et hypothecis. Edited separately by Bucher. Nuremberg, 1834.) — *Westphal*, Erläuterung der Röm. Gesetze vom Pfandrechte. 3d Ed. Leipsic, 1800.—*Erxleben*, Principia de jure pignorum et hypothecarum. Gottingen, 1779.— *Gesterding*, Pfandrecht. Greifswald, 1816. 2d Ed. 1831.—*Glück*, Comm. Vol. 14. § 861–875. Vol. 18. § 1076–1105.—*Minguet*, Diss. histor. jur. de pignoribus et hypothecis apud Romanos. Ghent, 1826. — *Sintenis*, Handbuch des gemeinen Pfandrechts. Halle, 1836. Comp. also: *Puchta*, Klagen. § 118–125.—*Unterholzner*, Schuldverhältnisse. Vol. 2. § 767–773.

(*b*) "The right of pawn and mortgage," says Mackeldey, "is a *real* right (*jus in re*)

* Many modern law writers are still in favour of certain general and tacit mortgages. Thus *Zachariä* (in his Vierzig Bücher vom Staate. 3d Vol. p. 149.) says that the law can and should recognise a tacit mortgage in cases where it binds one to give credit to another (e. g. *hypotheca uxorum, minorum*), and where claims arise out of real rights (as in the case of taxes, or of a money loan made for the erection of a building, &c.). But the advocates of this opinion, it seems, overlook that their exceptions only tend to overturn the rule and to deprive the system of its true merit, as has been experienced in those countries where the system has been adopted. Hence Prof. *Mittermaier* (pp. 660. 667.) very justly objects to the French system of mortgage, that the principles of specialty and publicity are not consistently carried out, since it admits a number of general and tacit mortgages; that the principles respecting the registry of the changes in the ownership of an estate and the burdens that adhere thereto are incomplete; that it allows judicial rights of pawn and mortgage; and that the arrangement of the registers is unsatisfactory. Comp. Civil Code of France, Art. 2071—2203. These objectionable provisions have been retained in the Civil Code of Louisiana. (See *Mittermaier*, Grundsätze des Deutschen Privatrechts. 6th Ed. Regensburg, 1842. Vol. I. §§ 260–270, where the history and principles of this doctrine are examined and discussed with great ability; and with reference to the particulars given in the text, comp. especially §§ 262—264 and § 266.)

With regard to the mode of registry, the plan most commonly adopted is to take an account of all the estates within the jurisdiction, and to appropriate to each estate a separate place in the register. A superscription contains the name of the estate, its situation, and the number of the house or piece of land; and in subdivisions are stated the name of the possessor, the title of possession, the value of the estate, the chief burdens on it, their extinction, the debts of mortgage, the dates of their transfer to others and of their cancelment. According to the Prussian law, every estate in each district must be numbered in a regular series and entered on the register on a separate folio. Under the first

satisfy himself by disposing of the thing.[a] If the creditor at the same time obtains possession of the thing, it is called a *pawn* (*pignus*, in the strict sense of the term); but if he does not obtain possession, it is called a *mortgage* (*hypotheca*).[b] The same principles in general apply to both.[c] The thing pledged is also called in the Roman law *res obligata, supposita, obnoxia.*[d]

II. Prerequisites.

A. Claim.

§ 337. The right of pawn and mortgage is in its nature a mere accessory right; consequently it always presupposes a claim, which it is designed

wherever it is granted in a corporeal thing; it partakes more of the nature of an *obligatio* (§ 338. No. 2.) only in the case where a claim is mortgaged. *Büchel* (Ueber die Natur des Pfandrechts. Marburg, 1833. p. 3.) on the other hand considers the right of pawn and mortgage as a *real right of obligation* in all cases; and in support of this view he urges that the peculiarity of this right simply consists in the fact that a thing, and not a person, is the subject obliged. A similar opinion is expressed by *Donellus*, Comm. jur. civ. Lib. 9. cap. 20. Lib. 15. cap. 49. and adopted by *Haas*, l. c. (see p. 371.) p. 61."—Prof. Rosshirt adds to this: "The writers of our days, in their attempts to reduce science to its elements, seem too much inclined to diminish the number of the latter; and this tendency it is which has given rise to two opinions that deny the peculiar nature of pawn and mortgage. Some jurists (e. g. *Löhr* and *Zimmern*) consider it as a conditional right of property, and they represent the *actio hypothecaria* of the mortgagee as a true *rei* (scil. pignoratæ) *vindicatio* or a *derivative* property action (but see contra: fr. 1. § 2. D. 20. 1.). Other writers (e. g. *Büchel*, l. c.; *Sintenis* in his Pfandrechtliche Streitfragen. Leipsic, 1835; and *Vangerow*, Leitf. § 363) regard it as an *obligatio realis*. The arguments employed by Büchel do not however prove any thing in favour of his opinion, but every thing against it. It is indeed true that something like a real obligation occurs in the German law of mortgage; but that does not warrant us in transferring these notions to the Roman law. The peculiar character of the Roman right of pawn and mortgage follows from the *actio hypothecaria* which was given to enforce it; for this reason the Roman jurists always termed this doctrine '*Liber ad formulam hypothecariam.*' Comp. const. *Omnem reipubl.* § 4.—*Schilling*, Institutionen. II. § 204.—*Fritz* zu Wening. § 162. note *p.*—*Rosshirt*, Gem. Deutsch. Civ. R. II. § 299."

(*a*) A true right of pawn or mortgage cannot be conceived of as applying to one's own property. fr. 45. pr. D. 50. 17. (Ulpianus) "*Neque pignus*, neque depositum, neque precarium, neque emtio, neque locatio *rei suæ consistere potest.*" — fr. 29. D. 13. 7. (Julianus) "Si rem alienam bona fide emeris, et mihi pignori dederis, ac precario rogaveris, *deinde me dominus heredem instituerit, desinit pignus esse*, et sola precarii rogatio supererit; idcirco usucapio tua interpellabitur." —fr. 33. § 5. D. 41. 3.—fr. 9. pr. D. 20. 6.—*Löhr* in his Mag. Vol. 4. p. 73.—*Wening-Ingenheim* in the Archiv. Civ. Prax. Vol. 6. p. 134.—*Jungenfeldt*, Ueber das Pfandrecht an eigener Sache. Giessen, 1827.—*Francke*, Civ. Abh. p. 108.—*Fritz* zu Wening. p. 545 seqq. — *Büchel*, Civilrechtl. Erörterungen. No. 2. p. 84. *Sintenis*, Pfandrechtliche Streitfragen. No. 2.

(*b*) *Cicero* ad div. XIII. 56. de offic. III. 14.—*Isidori* Origines. III. 25.

(*c*) § 7. J. 4. 6.—fr. 5. § 1. D. 20. 1.—fr. 9. § 2. D. 13. 7. (Ulpianus) "Proprie *pignus* dicimus, quod ad creditorem transit, *hypothecam*, cum non transit nec possessio ad creditorem."—fr. 238. § 2. D. 50. 16. (Gaius) "*Pignus* appellatum est a pugno, quia res, quæ pignori dantur, manu traduntur. Unde etiam videri potest verum esse, quod quidam putant, pignus proprie rei mobilis constitui."

(*d*) e. g. fr. 11. § 6. D. 13. 7.—const. 6. C. 8. 17. "Qui filios vestros vel liberos homines pro pecunia, quam vobis credebat, pignoris titulo accepit, dissimulatione se juris circumvenit, quum sit manifestum, obligationem pignoris non consistere, nisi in his, quæ quis de bonis suis facit obnoxia."—const. 6. § 2. C. 5. 9.

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head is placed the name of the possessor, his title of possession, and the value of the estate; and under the second head are noted the burdens and mortgages that rest upon it, their extinction, transfer, and time of cancelling. In another book, kept in chronological order, the documents are all engrossed at length; and from this only the essential part is copied into the register of mortgages.

to secure.[a] It is immaterial what may be the nature of this claim, whether a *civilis* or mere *naturalis obligatio*; as also what may be its object, against whom it may apply, and whether the claim exists already or only in anticipation.[b] The efficacy of the right of pawn and mortgage, however, regularly depends on the validity of the claim for which it is established.[c]

B. Thing capable.

§ 338. Every thing may be an object of the right of pawn and mortgage that can afford security to the creditor and that admits of being alien-

(*a*) fr. 5. D. 20. 1. (Marcianus) "Res hypothecæ dari posse sciendum est pro quacunque obligatione, sive mutua pecunia datur sive dos, sive emtio vel venditio contrahitur, vel etiam locatio et conductio, vel mandatum, et sive pura est obligatio, vel in diem, vel sub conditione, et sive in præsenti contractu, sive etiam præcedat. Sed et futuræ obligationis nomine dari possunt, et non solum solvendæ omnis pecuniæ causa, verum etiam de parte ejus, et vel pro civili obligatione, vel honoraria, vel tantum naturali. Sed in conditionali obligatione non alias obligamur, nisi conditio extiterit." § 1. (quoted p. 366. note *c*.) § 2. "Dare autem quis hypothecam potest sive pro sua obligatione, *sive pro aliena*."—fr. 25. D. ibid. (Modestinus) "Cum vitiose vel *inutiliter contractus pignoris* interedat, retentioni locus non est, nec si bona creditoris ad fiscum pertineant."—const. 1. C. 8. 33. "*Si pecuniam tibi non esse numeratam, atque ideo frustra cautionem emissam asseris, et pignus datum probaturus es, in rem experiri potes.* Nam intentio dati pignoris neque redditæ pecuniæ *non aliter tenebit, quam si de fide debiti constiterit.* Eademque ratione veritas servetur, si te possidente pignus, adversarius tuus agere cœperit."—const. 2. C. ibid. "Si, ut nunc asseveras, nihil creditor numeravit uxori tuæ, quæ pignus dedit, sed inanem extorsit cautionem, mendaci scriptura contra fidem veritatis obligari ejus res non potest."—*Thibaut*, Civ. Abh. No. 14.—*Seuffert*, Erört. 2d Div. No. 17.—*Gesterding*, Pfandrecht. § 3. 4. Concerning the nature of pawn and mortgage, as merely accessory rights, see: *Haas*, Ueber die Natur der Hypotheken. Bonn, 1831.

(*b*) fr. 5. pr. § 2. D. 20. 1. (quoted above, note *a*.)—fr. 8. § 1. D. 13. 7. (Pomponius) "Si pignori *plura* mancipia data sint, et quædam *certis pretiis* ita vendiderit creditor, ut evictionem eorum præstaret, et creditum suum habeat, reliqua mancipia potest retinere, donec ei caveatur, quod evictionis nomine promiserit, indemnem eum futurum."—fr. 14. § 1. D. 20. 1. (Ulpianus) "Ex quibus casibus *naturalis obligatio* consistit, pignus perseverare constitit."—const. 2. C. 8. 31. "Intelligere debes, vincula pignoris durare, *personali* actione submota." The meaning of the passage last quoted is explained in different ways. See with respect to it: *Mühlenbruch*, Cession. 2d Ed. p. 329.—*Schweppe*, Pand. R. Vol. 1. p. 379.—*Linde*, Civilproc. 2d Ed. § 156. note 12.—*Francke*, Civ. Abh. p. 78.—*Lühr* in the Archiv Civ. Prax. Vol. 10. p. 82.—*Guyet*, ibid. Vol. 11. p. 88.—*Buchholtz*, Jur. Abh. p. 390.

(*c*) fr. 2. D. 20. 3. (Gaius) "Si alius pro muliere, quæ intercessit, dederit hypothecam, aut pro filiofamilias, cui contra senatusconsultum creditum est, an his succurratur; quæritur. *Et in eo quidem, qui pro muliere obligavit rem suam, facilius dicetur, succurri ei*, sicuti fidejussori mulieris eadem datur exceptio. Sed et in eo, qui pro filiofamilias rem suam obligavit, *eadem dicenda erunt*, quæ tractantur et in fidejussore ejus."—fr. 33. D. 20. 1. See thereon: *Göschen*, Grundriss. p. 162. Respecting the validity of a pawn or mortgage given to secure an obligatio naturalis, opinions are very much at variance. Comp. *Weber*, Von der natürl. Verbindl. § 103–111.—*Seuffert*, Erört. II. No. 18.—*Reinhardt*, Von der natürl. Verbindl. § 115.—*Francke*, l. c. p. 65–128.—*Rosshirt's Z.* Vol. 1. No. 2. art. 1.—*Sintenis* in his Handb. § 10. According to Dr. Rosshirt's opinion, a pawn or mortgage given to ensure the performance of a natural obligation, is always valid (fr. 14. § 1. D. 20. 1.), unless the obligation be one against which the law has provided an exception as a defence; for in such case the pawn or mortgage must fall with the principal obligation, if the party takes advantage of the exception. But if the exception (e. g. the exceptio *Scti Velleiani*) has been renounced and the party still pleads it, it may be defeated by the replica doli. Comp. *Kattenhorn*, Intercession der Weiber. chap. 8.—Contra: *Büchel*, Abh. p. 180.—A pawn or mortgage moreover, is of no effect, wherever an action on the principal obligation can be defeated by the exceptio rei judicatæ (fr. 13. D. 20. 6.).—The case where the thing pledged has been given as an eventual payment, must be determined by the same rules as apply to a principal obligation which is fulfilled knowingly. See *Rosshirt's Z.* Vol. 2. No. 3.

ated.[a] Under this proviso, corporeal things of every kind, as well as incorporeal things, admit of being pawned or mortgaged. As to the capability and effect of a mortgage on things incorporeal, the principles are as follows: 1. As regards *servitudes*, the proprietor of the thing may grant to his creditor a *usufructus* in it by way of pledge;[b] the usufructuary may also pledge his usufruct to a creditor, but in this case the creditor cannot seize on the right of usufruct itself, but only on the fruits of the thing, and on these only so long as the rights of the pledger continue.[c] *Predial servitudes* which already exist, cannot be pledged without the dominant land to which they are attached;[d] but a *servitus rustica*, not also an *urbana*, may be granted by way of pledge by the proprietor of a piece of ground to his creditor, in such a manner that the creditor may enjoy it himself, and, in case his claim is not satisfied, may sell the servitude to another neighbour.[e] 2. When a *claim* is pledged, the mortgagee is entitled, in case of non-payment, either to dispose of the claim or to bring an *actio utilis* in his own name upon it, against the original debtor. If in such case a sum of money constitute the object of the claim, the creditor keeps only so much of it as is necessary to repay him; but if the object of the claim be a corporeal thing, he receives the latter *pignoris loco*.[f] 3. The

(*a*) fr. 9. § 1. D. 20. 1. (quoted above, p. 363. note *e*.)—See in general: Dig. XX. 3.—Cod. VIII. 16. 17. 21. — *Glück*, Comm. Vol. 19. § 1091.

(*b*) fr. 11. § 1. D. 20. 1. (Marcianus) "Si ἀντίχρησις facta sit, *et in fundum aut in ædes aliquis inducatur*, eo usque retinet possessionem *pignoris loco*, donec illi pecunia solvatur, quum in usuras fructus percipiat aut locando, aut ipse percipiendo, habitandoque; itaque si amiserit possessionem, solet in factum actione uti."—fr. 15. pr. D. ibid. (Gaius) "Et quæ nondum sunt, *futura tamen sunt, hypothecæ dari possunt, ut fructus pendentes, partus ancillæ, fœtus pecorum, et ea quæ nascuntur, sint hypothecæ obligata.* Idque servandum est, sive dominus fundi convenerit aut de usufructu, aut de his quæ nascuntur, sive is qui usumfructum habet, sicut Julianus scribit."—*Hepp* in the Archiv Civ. Prax. Vol. 13. p. 343. Vol. 15. p. 79.

(*c*) fr. 11. § 2. D. 20. 1. (quoted above, p. 331. note *c*.)—fr. 8. pr. D. 20. 6. (Marcianus) "Sicut re corporali extincta, ita et *usufructu extincto pignus hypothecave perit*."—fr. 15. pr. D. 20. 1. (quoted above, note *b*).

(*d*) fr. 16. D. 8. 1. and fr. 44. D. 19. 2. (quoted above, p. 336. note *c*.)—*Majansii* Disputt. Vol. 1. Disp. 4.

(*e*) fr. 11. § 3. fr. 12. D. 20. 1. (quoted p. 336. note *c*.)—*Gesterding*, Pfandrecht. p. 75.—On fr. 12. cit. see: *Glück*, Comm. Vol. 14. p. 24. Vol. 19. p. 207.—*Dernburg*, Beitr. zur Gesch. der Röm. Testamente. p. 144. 150.—*Hepp*, l. c. Vol. 13. p. 349.—*Büchel*, Erörterungen. No. 3. Marburg, 1835.—Concerning the mortgage on an emphyteusis or a superficies, comp. §§ 325. 330.

(*f*) fr. 18. pr. D. 13. 7. (Paulus) "Si convenerit, ut nomen debitoris mei pignori tibi sit, tuenda est a Prætore hæc conventio, ut et te in exigenda pecunia, et debitorem adversus me, si cum eo experiar, tueatur. *Ergo si id nomen pecuniarium fuerit, exactam pecuniam tecum pensabis, si vero corporis alicujus, id, quod acceperis, erit tibi pignoris loco.*"—fr. 13. § 2. D. 20. 1. (quoted in next note.)—fr. 20. D. ibid. (Ulp.) "Cum convenit, ut is, qui ad refectionem ædificii credidit, de pensionibus *jure pignoris ipse creditum* recipiat, *etiam actiones utiles adversus inquilinos accipiet*, cautionis exemplo, quam debitor creditori pignori dedit."—const. 4. C. 8. 17. "*Nomen quoque debitoris pignorari et generaliter et specialiter posse*, jam pridem placuit. Quare si debitor is satis non fecerit, cui tu credidisti, ille, cujus nomen tibi pignori datum est, nisi ei, cui debuit, solvit, nondum certior a te de obligatione tua factus, *utilibus actionibus satis tibi facere usque ad id, quod tibi deberi a creditore ejus probaveris, compelletur*, quatenus tamen ipse debet."—const. 7. C. 4. 39. "Postquam ea decursum est, ut *cautiones quoque debitorum pignori dentur*, ordinarium visum est, *post nominis venditionem utiles emtori*, sicut responsum est, *vel ipsi creditori postulanti dandas actiones*."—const. 2. C. 4. 15. "*Si* in causa judicati Valentis, quem tibi condemnatum esse proponis, nihil est, quod sine quæstione pignoris loco capi et distrahi possit, *debitores ejus conventi ad solutionem auctoritate Præsidis provinciæ compellantur.*"

right of pawn and mortgage itself may be made an object of pledge, i. e. one who holds a pawn or mortgage may pledge it again to his own creditor (*subpignus*); in which case, as regards payment, the latter has the preference.[a]

III. Extent of the Right of Pawn and Mortgage.

§ 339. The right of pawn and mortgage is, according to its object and extent, either a *pignus generale* or *speciale*.[b]

A. A *pignus generale s. hypotheca omnium bonorum* is a pledge of the whole of the property belonging to the debtor (as a *universitas juris*).[c] This general right of pawn and mortgage, when no express agreement is made to the contrary, extends also over such property as the mortgagor may afterwards acquire; and it applies to all things whatsoever belonging to the mortgaged estate, in the same manner

—*Gesterding*, Ueber die Schuldverbindlichkeit als Object des Pfandrechts. Greifswald, 1812., and his Pfandrecht. p. 76.—*Bohn* de nominis pignore. Berlin, 1818.—*Huschke* de pignore nominis. Gottingen, 1820.—*Mühlenbruch*, Cession. 2d Ed. p. 183.—*Pfeiffer*, Practische Ausf. Vol. 1. No. 1.—*Ortloff* in Schunck's Jahrb. Vol. 12. p. 201.—Contra: *Trotsche*, Das Verpfändungs-Recht des Pfandgläubigers. Güstrow, 1834. whose opinion is refuted by *Sintenis*, Pfandrechtl. Streitfragen. No. 2. p. 23. and in his Handb. p. 148 seqq.

(*a*) fr. 13. § 2. D. 20. 1. (Marcianus) "Quum *pignori rem pignoratam accipi posse placuerit*, quatenus utraque pecunia debetur, *pignus secundo creditori tenetur*, et tam exceptio, quam actio utilis ei danda est. Quodsi dominus solverit pecuniam, pignus quoque perimitur. Sed potest dubitari, numquid creditori nummorum solutorum nomine utilis actio danda sit, an non? Quid enim si res soluta fuerit? Et verum est, quod Pomponius libro septimo ad Edictum scribit: Si quidem pecuniam debet is, cujus nomen pignori datum est, exacta ea creditorem secum pensaturum; si vero corpus is debuerit, et solverit, pignoris loco futurum apud secundum creditorem." — fr. 14. § 3. D. 44. 3. (Scævola) "Et si mihi pignori dederis, et ego eandem rem alii pignoravi, meus creditor utetur accessione tui temporis, tam adversus extraneum, quam adversus te ipsum, quamdiu pecuniam mihi non exsolveris: nam qui me potior est, cum ego te superaturus sim, multo magis adversus te obtinere debet; sed si pecuniam mihi solveris, hoc casu accessione tua non utetur." — const. 1. C. 8. 24. "*Etiam id, quod pignori obligatum est, a creditore pignori obstringi posse*, jam dudum placuit, scilicet ut sequenti creditori utilis actio detur, tamdiuque eum is, qui jus repræsentat tueatur, quamdiu in causa pignoris manet ejus, qui dedit. Sed si vos usumfructum possessionis tantummodo pignori dedistis, isque, qui accepit, alii eam possessionem, cujus usumfructum nexum habebat, sine vestra voluntate pignoravit, creditor ejus id, in quo pignoris vinculum non constitit, distrahens, dominio vos privare nequivit. Quodsi non fuit vestro creditori ususfructus, sed ipsa possessio pignorata, et ante exsolutam a domino pecuniam creditor secundus pignus acceptum vendidit, *non posse vendicionem post solutam pecuniam rescindi*, divorum principum placitis continetur."—const. 2. C. ibid. "Si creditor possessionem, quæ a parentibus tuis pignoris jure fuerat obligata, non vendidit, *sed alii creditori pignori dedit*, examinata fide veri *poteris eam soluto eo, quod ex hac causa creditori debetur, intercessu Præsidis provinciæ recuperare*." — *Hepp* in the Archiv Civ. Prax. Vol. 13. p. 530. Vol. 15. p. 86.—Comp. *Lohr*, ibid. Vol. 14. p. 162–164.—*Mühlenbruch*, Cession. 3d Ed. p. 332 seqq.—*Trotsche*, l. c.—*Sintenis*, Pfandrechtl. Streitf. No. 2. and in his Handb. p. 674. — *Hofmann*, Versuche. Darmstadt, 1835. No. 5.

(*b*) *Gesterding*, Pfandrecht. § 8–10. Concerning the nature of a pignus speciale and generale, opinions are very much at variance. See: *Merz* de vera indole divisionis hypothecarum in generales et speciales. Tubingen, 1818.—*Zimmern*, Röm.-rechtl. Untersuch. Vol. 1. p. 296.—*Caplik* de generalis specialisque hypothecæ discrimine. Gottingen, 1820.—*Baumbach*, Vertheidigung einer Florentinischen Lesart in L. 2. D. qui potiores sunt in pignore. Jena, 1820.—*Hofmann*, Ueber den Einfluss allgemeiner Pfandrechte auf die einzelnen Sachen des Schuldners. Darmstadt, 1830.—*Rosshirt* in his Z. No. 1.

(*c*) A hypotheca generalis extending over the mortgagor's future estate is granted where the whole of his estate has been pledged either without any specification or with

as if they had been specified and separately pledged, so that the single things which have passed into the possession of a third party can always be reclaimed from him by the mortgagee.[a]

B. A *pignus speciale* exists: 1. When single things are pledged separately. Here the right of pawn or mortgage attaches to each single thing, and passes with it to every one who subsequently acquires it.[b] 2. When a number of things are pledged as a *whole*, or *universitas rerum* (§ 149). If in such case the *universitas* pledged consists of things which according to their destination are subject to a continual change by sale or otherwise, as e. g. a flock of sheep, or the stock of a shop or warehouse, every thing that is sold from it singly is freed from the mortgage.[c] And on the other hand, every thing that is afterwards added to the *universitas*, becomes subject to the mortgage, whether the addition arises from production or from purchase. This last rule, however, holds good only so long as the pledged *universitas* remains in the possession of the mortgagor himself; for as soon as it passes to his heirs, the mortgage applies only to the pieces contained in it at such time and the produce therefrom, but not to the new pieces procured and added thereto by the heir; and in case it passes to a third singular successor, the mortgage applies not even to the subse-

only a partial specification of the things of which it consists.—const. 9. Cod. 8. 17.

(*a*) fr. 1. pr. fr. 15. § 1. D. 20. 1.—fr. 34. § 2. D. ibid. (Scævola) "Creditor pignori accepit a debitore, *quidquid in bonis haberet habiturusve esset*. Quæsitum est: an corpora pecuniæ, quam idem debitor ab alio mutuam accepit, quum in bonis ejus facta sint, obligata creditori pignori esse cœperint? Respondi: *cœpisse*."—const. 9. C. 8. 17. "Si quis in cujuscunque contractus instrumento ea verba posuerit: *fide et periculo rerum ad me pertinentium*, vel: *per earum exactionem satisfieri tibi promittô*, sufficere ea verba ad rerum tam earum, quas in præsenti debitor habet, quam futurarum hypothecam, sancimus, nec ex prioribus sanctionibus minus habere specialis hypothecæ memoriam videri, quum sit justum, voluntates contrahentium magis, quam verborum conceptionem inspicere. Super qua generali hypotheca illud quoque ad conservandam contrahentium voluntatem sancimus, ut, si res suas supponere debitor dixerit, non adjecto, '*tam præsentes quam futuras*,' jus tamen generalis hypothecæ etiam ad futuras res producatur."—const. 8. § ult. C. 5. 9.—*Baumbach* in the Archiv Civ. Prax. Vol. 4. p. 31. 418.—Another opinion is advanced by *Hagemann*, Pract. Erört. Vol. 6. No. 98. and *Bülow*, Abh. Vol. 1. No. 1.—But see, contra: *Kayff*, Civilrechtssprüche. Vol. 1. No. 71.—*Seuffert*, Erört. Vol. 2. No. 19.—*Langenn* and *Kori*, Erört. Vol. 1. No. 10.—Comp. also *S. P. Gans*, Zeitschrift. Vol. 1. No. 28. and *Rosshirt*, l. c.

(*b*) fr. 18. § 2. D. 13. 7. (Paulus) "*Si fundus* pignoratus venierit, *manere causam pignoris* constitit; quia cum sua causa fundus transeat, sicut in partu ancillæ, *qui* post venditionem natus sit."—const. 12. C. 8. 28.—"Si debitor *rem* tibi jure pignoris obligatam te non consentiente distraxit, *dominium cum sua causa transtulit ad emtorem*."—const. 15. C. 8. 14. "Debitorem neque vendentem, neque legantem vel *fideicommissum* relinquentem posse deteriorem facere creditoris conditionem, certissimum est. Unde si tibi obligatam rem probare posse confidis, *pignora persequi debes*."—Still the pledge does not apply to things procured by selling the object pledged. fr. 7. in fin. D. 20. 4.—const. 3. C. 8. 15.

(*c*) fr. 34. pr. D. 20. 1. (Scævola) "Quum *tabernam* debitor creditori pignori dederat, quæsitum est: utrum eo facto nihil egerit, an tabernæ appellatione merces, quæ in ea erant, obligasse videatur? et si eas merces per tempora distraxerit, et alias comparaverit, easque in eam tabernam intulerit, et decesserit, an *omnia*, quæ ibi deprehenduntur, creditor hypothecaria actione petere possit, quum et mercium species mutatæ sint, et res aliæ illatæ?" Respondi: *ea quæ mortis debitoris tempore in taberna inventa sunt, pignori obligata esse videntur*."—*Zimmern* in Linde's Z. Vol. 1. p. 49.—*Haubold*, Inst. Lineamenta. Ed. by Otto. p. 308.

quent produce.[a] 3. When only a part of an entire property, whether a *pars quanta* or *quota*, is pledged.[b]

C. Sometimes where a general hypothecation is made, a single thing belonging to the property is also pledged separately. When in such case the latter is intended to constitute the first and principal, and the remaining property only a subsidiary pledge, the creditor must first proceed against the thing specially pledged.[c] On the other hand, if the special pledge be given subsequent to the general hypothecation, his right to seize first upon what things he pleases is not restricted thereby.[d] So too when several things are specially pledged to the creditor, and there is no agreement to the contrary, he has his choice as to which he will proceed against.[e]

TITLE SECOND.

ESTABLISHMENT OF MORTGAGES.

I. By Private Will.

A. Requisites.

§ 340. A right of pawn or mortgage may arise from an exercise of *private will*, i. e. either by agreement or by testament. It can be granted only by the proprietor of the thing to be pledged, or by one who has at least a right to dispose of the same; but it is immaterial whether it be given for his own or for another's debt.[f] So too a joint-

(*a*) const. 3. C. 8. 15.—fr. 13. pr. D. 20. 1. (Marcianus) "Grege pignori obligato, *quæ postea nascuntur, tenentur.* Sed et si pristinis capitibus decedentibus totus grex fuerit renovatus, *pignori tenebitur.*"—fr. 26. § 2. fr. 29. pr. § 1. D. ibid.

(*b*) For instance, const. 1. C. 6. 43.—Nov. 108. c. 2.—*Löhr* in the Archiv Civ. Prax. Vol. 4. p. 208.

(*c*) fr. 15. § 1. D. 20. 1.—const. 9. C. 8. 28. "Quæ specialiter vobis obligata sunt, debitoribus detractantibus solutionem, bona fide debetis et solemniter vendere. Ita enim apparebit, an ex pretio pignoris debito satisfieri possit. *Quodsi quid deerit, non prohibemini cetera etiam bona jure conventionis consequi.*"—const. 2. C. 8. 14. "Quamvis constet, specialiter quædam et universa bona generaliter adversarium tuum pignori accepisse, et æquale jus in omnibus habere, jurisdictio tamen temperanda est. Ideoque si certum est, *posse eum ex iis, quæ nominatim ei pignori obligata sunt, universum redigere debitum, ea, quæ postea ex iisdem bonis pignori accepisti, interim tibi non auferri, Præses provinciæ jubebit.*"—*Kock*, Diss. de concursu hypothecæ specialis et generalis. Giessen, 1782.—*Weber*, Versuche über das Civilrecht. Vol. 2. p. 177.—*Glück*, Comm. Vol. 18. p. 235.—*Gesterding*, Pfandrecht. p. 345.—*Caplik*, l. c. p. 73.—*Hepp* in the Archiv Civ. Prax. Vol. 9. p. 368.—*Zimmern* in Linde's Z. Vol. 1. p. 47.—*Schröter*, ibid. Vol. 1. p. 327.—*Elvers'* Allgem jur. Zeit. 1829. No. 83. 1830. No. 26.—*Thibaut* in the Archiv Civ. Prax. Vol. 17. p. 1 seqq. Contra: *Mühlenbruch*, Pandecten. § 319. note 9.

(*d*) See especially *Thibaut*, l. c. p. 25.—*Rosshirt*, Gem. Deutsch. Civ. R. Vol. 2. § 305. note 4.—*Höpfner*, Comm. Ed. by A. D. Weber. p. 551.

(*e*) fr. 8. D. 20. 5. This right of choice holds good also in the case where two single things are pledged. Hence a creditor who has an inferior mortgage in one of them, has no other way of protecting his interest than to avail himself of the jus offerendi.

(*f*) fr. 2. D. 13. 7. (Pomponius) "Si debitor rem pignori datam vendidit et tradidit, tuque ei nummos credidisti, quos ille solvit ei creditori, cui pignus dederat, tibique cum eo convenit, ut ea res, quam jam vendiderat, pignori tibi esset, *nihil te egisse constat, qui rem alienam pignori acceperis*; ea enim ratione emtorem pignus liberatum habere cœpisse: neque ad rem pertinuisse, quod tua

owner is allowed to pledge his share in the thing;[a] and even a thing belonging to another may be pledged, if its owner consents to the pledging,[b] or afterwards approves of it,[c] or if he who pledges it does so on condition that he is to become proprietor of it himself.[d] Moreover, the pledging of another's property always becomes valid when the pledgor subsequently becomes proprietor.[e] But, whether, on the other hand, it is rendered valid by the proprietor's afterwards becoming heir of the pledgor, is a question much controverted; the affirmative opinion, however, deserves the preference.[f] Again, where the alienation of a thing would require certain formalities, the same formalities must be observed in pledging it.[g]

B. Different Kinds.

§ 341. A right of pawn or mortgage may be granted voluntarily: 1. By *agreement*. This is either a *contractus pignoratitius*, when a pawn is given; or a *pactum hypothecæ*, when a mortgage is established. In the former case, the delivery of the thing is requisite to the acquisition

pecunia pignus sit liberatum." — const. 2. C. 8. 16. "Si probaveris, prædia vel hortos, de quibus agebatur, tuos esse, *intelligis, obligari eos creditori ab alio non potuisse*, si non sciens, hoc agi, in fraudem creditoris ignorantis dissimulasti." — fr. 5. § 2. D. 20. 1. (quoted above, p. 371. note *a*.)—*Gesterding*, Pfandrecht. § 12.

(*a*) const. un. C. 8. 21. "Frater vester, sicut vobis invitis portionem vobis competentem obligare non potuit, *ita suam dando obligationem creditori quæsivit*. Unde intelligitis, contractum ejus nullum præjudicium dominio vestro facere potuisse."—fr. 3. § 2. D. 20. 4.—fr. 7. § 4. D. 20. 6. (Gaius) "Illud tenendum est, *si quis communis rei partem pro indiviso dederit hypothecæ*, divisione facta cum socio, non utique eam partem creditori obligatam esse, quæ ei obtingit, qui pignori dedit, sed *utriusque pars pro indiviso pro parte dimidia manebit obligata*."—*Westphal*, Pfandrecht. § 108.

(*b*) This is tacitly done, if he becomes security for the mortgagor or if he from bad faith does not object to the pledging.—fr. 5. § 2. D. 20. 2. (Marcianus) "Si quis fidejubeat, quum res illiusa debitore, pro quo fidejussit, pignori data sit, bellisime intelligitur, *hoc ipso, quod fidejubeat, quodammodo mandare, res suas esse obligatas*. Sane si postea sint ejus res hypothecæ datæ, non erunt obligatæ."—fr. 41. in fin. D. 13. 7.—const. 2. C. 8. 16. (quoted above).

(*c*) fr. 20. pr. D. 13. 7. (Paulus) "Aliena res pignori dari voluntate domini potest. Sed et si ignorante eo data sit, *et ratum habuerit*, pignus valebit."—fr. 16. § 1. D. 20. 1. (Marcianus) "Si nesciente domino res ejus hypothecæ data sit, deinde postea dominus *ratum habuerit*, dicendum est, hoc ipsum, *quod ratum habet*, voluisse eum retro recurrere ratihabitionem ad illud tempus, quo convenit. Voluntas autem fere eorum demum servabitur, qui et pignori dare possunt."

(*d*) fr. 16. § 7. D. ibid. (Idem) "Aliena res utiliter potest obligari sub conditione, *si debitoris facta fuerit*."—*Mayer* in the Archiv Civ. Prax. Vol. 9. p. 246. and in the Tüb. krit. Z. Vol. 5. p. 357.—*Müller* in the Archiv Civ. Prax. Vol. 11. p. 392.—*Schrader*, in the Tüb. krit. Z. Vol. 2. p. 65.

(*e*) fr. 41. D. ibid. 7.—const. 5. C. 8. 16. (quoted above, p. 278. note *c*.) Provided the creditor was in bona fide at the time the pawn was given, otherwise he has merely a right of retention. fr. 1. pr. in fin. D. 20. 1.

(*f*) fr. 41. D. 13. 7. — fr. 22. D. 20 1. (Modestinus) "Si Titio, qui rem meam ignorante me creditori suo pignori obligaverat heres extitero, *ex post facto pignus directo quidem non convalescit, sed utilis pignoratitia dabitur creditori*."—See thereon: *Gesterding*, Pfandrecht. p. 110.—*Glück*, Comm. Vol. 14. p. 32 seqq.—*Mayer*, l. c.—*Müller*, l. c.—*G. C. Müller*, Comm. ad L. 22. D. de pignor. et ad L. 41. de pignor. act. Kiel, 1838. The opinion adopted in the text is also supported by the analogous decisions in const. 5. C. cit. and const. 14. C. 3. 32.—Comp. also fr. 9. § 3. D. 20. 4.—*Buchel*, l. c. p. 15.—*Sintenis*, l. c. p. 99.

(*g*) fr. 1. D. 27. 9. (Ulpianus) "Imperatoris Severi oratione prohibiti sunt tutores et curatores prædia rustica vel suburbana distrahere. § 1. Quæ oratio in senatu recitata est Tertullo et Clemente consulibus, Idibus Juniis. § 2. Et sunt verba ejus hujusmodi: Præterea patres conscripti, interdicam tuto-

of the right; in the latter, it is not.[a] 2. By *testament*, where the right of pawn is acquired ipso jure at the moment of the testator's decease.[b] In either case, the intention of the pledgor to pledge a thing, may also be inferred from his acts, where these acts admit of no other construction.[c]

C. Their Commencement.[d]

§ 342. The *conventional* right of pawn or mortgage arises at the moment of pledging; unless the debt be not yet in existence, in which case it takes effect at the time when the debt arises.[e] The *testamentary* right of pawn or mortgage never takes effect before the moment of the testator's death, even though the debt should have previously existed. If, however, the debt is not already in existence at the time of the testator's death, the right of pawn or mortgage does not commence until the debt exists.[f]

D. Claims for which they are liable.

§ 343. Where a pledge is given in general terms, it secures not only the principal debt, but also the interest agreed upon, the *usuræ moræ*, and the costs of suit incurred by the creditor, and likewise the *impensæ necessariæ* and *utiles*;[g] still as regards the interest and conventional penalties (§ 177), they are covered by the pledge, only so far as they have been agreed upon at the time of pledging.[h] But if the pledge

ribus et curatoribus, ne prædia rustica vel suburbana distrahant, nisi, ut id fieret, parentes testamento vel codicillis caverint. Quodsi forte res alienum tantum erit, ut ex rebus ceteris non possit exsolvi, *tunc Prætor urbanus vir clarissimus adeatur, qui pro sua religione æstimet, quæ possint alienari, obligarive debeant*, manente pupillo actione, si postea potuerit probari, obreptum esse Prætori. Si communis res erit, et socius ad divisionem provocet, aut si creditor, qui pignori agrum a parente pupilli accepit, jus exequatur, nihil novandum censeo."—const. 22. C. 5. 37.—const. 2. C. 5. 70.—const. 1. C. 5. 71.

(*a*) § 7. in fin. J. 4. 6.—fr. 1. pr. D. 13. 7. (Ulpianus) "Pignus contrahitur non solum *traditione*, sed etiam *nuda conventione*, etsi non traditum est."—fr. 4. D. 20. 1.—*Gesterding*, Pfandrecht. § 15–17.

(*b*) fr. 26. pr. D. 13. 7.—fr. 12. D. 34. 1.—*Musset* de jure pignoris legato. Spec. 1. 2. Heidelberg, 1810. 1811.

(*c*) fr. 5. § 2. D. 20. 1. (quoted p. 371. note *a*.) —const. 9. C. 8. 17.—*Weber*, Versuche. No. 2.—*Seuffert*, Erört. Vol. 2. No. 22. Hence a conventional right of mortgage may arise from a tacit grant; though this must not be confounded with the so-called pignus tacitum of the Romans (§ 345).

(*d*) *Hepp*, Diss. qua inquiritur ex quo tempore hypotheca bona debitoris afficiat. Leipsic, 1825. (Translated into German with improvements, in the Archiv Civ. Prax. Vol. 10. p. 245.)—Comp. *Buckholtz*, Qui potiores sunt in pignore. Konigsberg, 1829. p. 57 seq.

(*e*) fr. 1. fr. 9. fr. 11. 12. D. 20. 4.—fr 4. D. 20. 3. (Paulus) "Titius, quum mutuam pecuniam accipere vellet a Mævio, cavit ei, et quasdam res hypothecæ nomine dare destinavit; deinde postquam quasdam ex his rebus vendidisset, accepit pecuniam. Quæsitum est: an et prius res venditæ creditori tenerentur? Respondit: quum in potestate fuerit debitoris, post cautionem interpositam pecuniam non accipere, *eo tempore pignoris obligationem contractam videri, quo pecunia numerata est*, et ideo inspiciendum, quas res in bonis debitor numeratæ pecuniæ tempore habuerit."—*Glück*, Comm. Vol. 19. p. 232 seqq. —*Heise* and *Cropp*, Jur. Abh. Vol. 2. No. 15.

(*f*) Concerning the time when the mortgage takes effect in this case, see: fr. 1. pr. D. 20. 1.—fr. 3. § 1. fr. 7. § 1. D. 20. 4.—*Gesterding*, Pfandrecht. p. 83. 248 seqq.—*Hepp* in Rossbirt's Z. f. Civ. u. Crim. R. III. 3.

(*g*) fr. 8. pr. § 5. fr. 25. D. 13. 7.—const. 6. C. 8. 14.—fr. 13. § 6. D. 20. 1. (Marcianus) "Propter *usuras* quoquo si obligata sit hypotheca, usuræ solvi debent. Idem et in *pœna* dicemus."— *Gesterding*, Pfandrecht. § 5. Idem, Nachforschungen. Vol. 4. p. 1.

(*h*) Arg. fr. 54. pr. D. 19. 2. compared with

be expressly given for securing the principal sum, or the interest, or a part of the debt, it is liable for that only for which it was given.[a]

II. By a Judicial Act.

§ 344. A right of pawn or mortgage may also be established, contrary to the will of the proprietor, by a *judicial decree*; and this may be effected in two different ways.

A. By a decree of the prætor, granting the creditor a provisional possession of the debtor's property (*missio creditoris in bona debitoris*).[b] The following are the cases in which such a decree is given: 1. The *immissio damni infecti causa*, whose object is to secure against an injury that may arise from the falling of a neighbouring house;[c] 2. the *immissio legatorum servandorum causa*, for securing a legacy left *sub conditione* or *die*;[d] 3. the *missio ventris in possessionem*, whereby a widow is put in possession of an inheritable estate, for the purpose of securing the rights of a posthumous child.[e] The right of pawn and mortgage founded on such prætorian immissions is called *pignus prætorium*.[f]

B. By *pignoris capio*, when the prætor commands that things shall be taken from a defaulting debtor for the purpose of enforcing obedience, or as a punishment; or when, in executing the sentence, he orders the goods of the defendant to be seized. The right of pawn and mortgage arising in this latter case was called *pignus ex causa judicati captum*;[g] the modern term for it is *pignus judiciale*.

III. By Operation of Law.

§ 345. Lastly, the right of pawn and mortgage is founded in many cases on a grant of the law; so that it attaches ipso jure to a claim as soon as the latter exists, independent of any declaration by the

const. 4. C. 4. 32.—*Weber*, Versuche. p. 151. —*Seuffert*, Erört. II. No. 23.

(*a*) fr. 11. § 3. D. 13. 7. (Ulpianus) "*Si in sortem duntaxat, vel in usuras obstrictum est pignus, eo soluto, propter quod obligatum est, locum habet pignoratitia.* Sive autem usuræ in stipulatum sint deductæ, sive non, si tamen pignus et in eas obligatum fuerit, quamdiu quid ex his debetur, pignoratitia cessabit. Alia causa est earum, quas quis supra licitum modum promisit; nam hæ penitus illicitæ sunt."—fr. 5. § 1. D. 20. 2.

(*b*) fr. 26. § 1. D. 13. 7. (Idem) "Sciendum tamen, ubi jussu magistratus pignus constituitur, non alias constitui, nisi *ventum fuerit in possessionem*."—fr. 3. § 1. D. 27. 9. —*Gesterding*, Pfandrecht. § 22. See also above, p. 176 seq.

(*c*) Dig. 39. 2.

(*d*) Dig. 36. 4.—Cod. 6. 54.—This immission has been abolished, since a special legal mortgage (§ 347) is granted to the legatee.—const. 1. 3. C. 6. 43.—*Löhr* in his Mag. Vol. 3. (1.) p. 195. and in the Archiv Civ. Prax. Vol. 5. p. 208.

(*e*) Dig. 37. 9.—There was another kind of immission in use among the Romans, viz. the missio rei servandæ causa, which took place when the defendant did not appear at the time appointed for litis-contestation upon the action. This immission however is no longer applicable in Germany. fr. 2. D. 42. 4.

(*f*) According to the later Roman law, when the old ordo judiciorum had ceased to exist, those immissions of the creditor as well as the pignorum capio no longer belonged exclusively to the jurisdiction of the prætor, but could also be ordered by every other court. Cod. 8. 22.

(*g*) fr. 31. 58. D. 42. 1.—fr. 50. 74. § 1. D. 21. 2.—fr. 10. D. 20. 4.—Cod. 8. 23.—7. 53.—*Küstner*, Diss. de pignore in causa judicati capto. Leipsic, 1744.

parties.[a] This is called by the Romans *pignus quod tacite contrahitur*,[b] or *tacita hypotheca*,[c] and by the moderns *pignus legale*. A right of pawn or mortgage cannot arise by prescription.[d]

A. General legal Mortgages.[e]

§ 346. Legal rights of pawn and mortgage are either general or special.

A *general* legal mortgage is given:

1. To the *fiscus* (public treasury) on the property of subjects, on account of taxes which are in arrears, from the day they become due;[f] also on the property of every one who contracts with it, on account of any claims arising from such contract; and consequently on the property of its officers and administrators, from the time they enter upon their offices.[g]

2. To a *husband*, on account of a *dos* promised to him, on the property of the promissor; from the day of the marriage, if the promise was given before or at that time,—otherwise, from the time when the promise was made.[h]

3. To a *wife*, her heirs, and her father, on the property of her husband, on account of restitution of the *dos*, from the day of the marriage, if the *dos* was given before that time,—otherwise, from the day when it was given; also on account of the increase of the *dos* from the moment

(*a*) Dig. 20. 2.—Cod. 8. 15.—*Gesterding*, Pfandrecht. § 19.

(*b*) This name is given to it, because it is regarded by the law, in all cases where it applies, as tacitly agreed upon by the parties (*quasi id tacite convenerit*).—fr. 3. fr. 4. pr. D. 20. 2. fr. 7. pr. D. ibid. (quoted p. 338. note *d*.)—const. 1. C. 6. 43.

(*c*) const. un. § 1. C. 5. 13. "Et ut plenius dotibus subveniatur, quemadmodum in administratione pupillarium rerum, et in aliis multis juris articulis *tacitas hypothecas* inesse accipimus, ita et in hujusmodi actione damus ex utroque latere hypothecam, sive ex parte mariti pro restitutione dotis, sive ex parte mulieris pro ipsa dote præstanda vel rebus dotalibus evictis, sive ipsæ principales personæ dotes dederint vel promiserint, vel susceperint, sive aliæ pro his personæ, et dos sive adventitia, sive profectitia sit, secundum veteris juris nominationem.—Etsi sine scriptis dos vel detur, vel promittatur, vel suscipiatur, simili modo intelligi factam stipulationem et hypothecam ex utraque parte, quasi fuerit scripta. Et natura quidem ex stipulatu actionis hæc intelligatur, re uxoria in posterum cessante."

(*d*) The opposite opinion which is supported by *Wankel* (Diss. de pignore usucapto. Giessen, 1766.), and *Schmidt* (Erwerb des Pfandrechts durch Verjährung. Jena, 1788.), has been fully refuted by *Thibaut*, Verjährung. § 37.—*Unterholzner*, Verjährungslehre. Vol. 2. § 247. 248.—*Büchel*, Natur des Pfandrechts. § 51.

(*e*) Concerning legal mortgages, see particularly: *Meissner*, Vom stillschweigenden Pfandrecht. 2 Vols. Leipsic, 1803. 1804.—*Glück*, Comm. Vol. 18. 19. §§ 1086–1089.—*Michiels Van Verduynen*, Diss. de hypothecis legalibus in jure Rom. Liege, 1824.—*Gesterding*, Pfandrecht. §§ 20. 21.—*Göschen*, Grundriss. pp. 164–176.

(*f*) fr. 5. § 2. D. 50. 15.—const. 1. C. 4. 46.—const. 1. C. 8. 15. "*Universa* bona eorum, *qui censentur*, vice pignorum tributis obligata sunt."—*Buckholtz*, Qui potiores sant in pignore. Konigsberg, 1829. p. 41.

(*g*) const. 2. C. 8. 15. (Hermogenianus) "Certum est, ejus, *qui cum fisco contrahit*, bona veluti pignoris titulo obligari, quamvis specialiter id non exprimatur."—const. 1. C. 7. 73. "Bona mariti tui si ob reliqua administrationis primipilaris *a fisco occupata sunt*, res, quas tuas esse liquido probaveris, ab aliis separatæ tibi restituantur."—fr. 46. § 3. D. 49. 14. "Fiscus semper habet jus pignoris."—See also: fr. 47. pr. D. ibid.—const. 2. C. 7. 73.—*Schrüter* in the *Z.* für Civ. R. u. Proc. Vol. 1. p. 336.

(*h*) const. un. § 1. C. 5. 13. (quoted in note *c*.).

of its accruing ;[a] furthermore, on account of the *donatio propter nuptias*, on the property of him who has promised it to her ;[b] and lastly, on account of her *parapherna*, on the property of her husband, from the time when she entrusted him with the management of them.[c]

4. To the children of a former marriage, on the property of their step-father, on account of their claims arising out of their mother's guardianship over them, from the time of her second marriage.[d]

5. To the *children*, on the property of their father or mother, on account of their claim to those *lucra nuptialia* of the one or the other, the proprietorship (*proprietas*) of which falls to them, either at the time when the marriage of their parents is dissolved, or when the parent who acquired them marries again, since he thereby forfeits his right in them (*proprietas*) to the children of the previous marriage. This general mortgage dates in the former case from the dissolution of the marriage; and in the latter case, not from the time of the second marriage, but from the time when the parent acquired the *lucra nuptialia* which he has now forfeited to the children.[e]

6. To the *children*, on the property of their father, on account of their own property which is under his management, in so far as this has descended to them from their mother or their maternal ancestors (*bona materna et materni generis*). This mortgage of the children dates from the time when the management of the property came into their father's hands.[f]

7. To *pupils*, minors, and insane persons, on the property of their tutors and curators, on account of their claims arising from the tutelage or curatorship, from the time when it was or should have been undertaken.[g]

(*a*) const. un. § 1. C. cit.—const. 19. C. 5. 3. —§ 29. J. 4. 6.—*Gottschalk*, Diss. for. Vol. 1. c. 3.—*Tigerström*, Dotalrecht. Vol. 2. § 69–76.

(*b*) Nov. 109. cap. 1.

(*c*) const. 11. C. 5. 14.

(*d*) const. 2. C. 5. 35.—const. 6. C. 8. 15.

(*e*) const. 6. § 2. const. 8. § 4. 5. C. 5. 9.—Nov. 22. c. 24.—Nov. 98. c. 1. 2.—*Marezoll* in the Z. für Civ. R. u. Proc. Vol. 3. p. 84.

(*f*) According to the common opinion, this legal mortgage is founded on const. 6. § 1. 2. 4. C. 6. 61.—*Meissner*, l. c. § 132.—*Glück*, Comm. Vol. 19. p. 134.—*Thibaut*, System. § 643.—*Wening*, Civ. R. Vol. 2. § 136.—*Pfeiffer*, Pract. Ausf. Vol. 1. p. 34.—*Von Der Nahmer*, Entscheidungen. Vol. 2. No. 26.—But it is disputed by *Löhr* in the Archiv. Civ. Prax. Vol. 9. p. 71. where he undertakes to show that const. 6. § 4. cit. has reference only to the lucra nuptialia. Löhr afterwards defended his opinion again (ibid. Vol. 10. p. 386 seqq.), in order to answer the objections made by *Mayer* (in the Tüb. krit. Z. Vol. 2. p. 110.), *Puchta* (in Schunck's Jahrb. Vol. 5. p. 280.). and *Francke* (Erläuterung einzelner Rechtsmaterien. p. 108.)—Comp. also *Fritz*, l. c. p. 432.

(*g*) const. 20. C. 5. 37.—const. un. § 1. C. 5. 13. (quoted p. 379. note *c*.)—const. 7. § 5. C. 5. 70.—Nov. 118. c. 5. in fin.—*Bauer*, Diss. ex quo tempore tacita hypotheca pupilli bona tutoris afficiat. Leipsic, 1761.—*Van Wessel*, Diss. de bonis tutorum tacita hypotheca devinctis. Utrecht, 1805.—*Gensler* in the Archiv Civ. Prax. Vol. 1. No. 27.—Prodigal and infirm persons have no legal mortgage in the property of their curator, but merely a *privilegium exigendi*; and absentees can claim neither the one nor the other. fr. 19–23. D. 42. 5. (see above, § 221.)—*Spangenberg*, Pract. Erört. Vol. 1. p. 97. This is contradicted with regard to prodigal persons, by *Bibes*, Diss. de legali pupillorum et eorum quibus bonis interdictum est hypotheca. Groningen, 1819. and by Göschen, l. c. p. 169.—Concerning the time when this mortgage takes effect, see: *Rudorff*, Vormundschaftsrecht. Vol. 3. p. 91.

8. To any one whom a testator has appointed to take the legacy, in case the widower or widow violates the *conditio viduitatis*, on the property of such widower or widow, from the time when the condition is violated.[a]

9. To the *church*, on the property of its emphyteuta, on account of the deterioration of the emphyteutic estate, from the time when such deterioration takes place.[b]

B. Special legal Mortgages.

§ 347. A *special* legal mortgage is given to the following parties:

1. To the lessor of a *prædium urbanum*, on account of his claims arising from the contract of hiring; and this covers every thing which the tenant brings upon the premises for ordinary and not merely transient use (*invecta et illata*), from the moment of their illation.[c]

2. To the lessor of a *prædium rusticum*, on the fruits reaped by the tenant, from the day of their perception.[d] Both these rights of mortgage belong also to an under-lessor; but the right of mortgage of the first lessor is in no wise diminished thereby.[e]

3. To any one who has loaned money for the rebuilding of an edifice (*ad restitutionem ædium*), on the building thus restored and on the soil beneath it (*pignus insulæ*); provided the money was loaned expressly

(*a*) Nov. 22. c. 44. §§ 2. 8.—*Marezoll* in Löhr's Mag. Vol. 4. (2.) p. 215. denies this legal mortgage.—Contra: *Mayer* in the Tüb. krit. Z. Vol. 2. p. 115.—*Vermehren* in the Archiv Civ. Prax. Vol. 13. p. 37.—*Buchholtz*, l. c. p. 65.—*Kämmerer* in the Z. für. Civ. R. u. Proc. Vol. 6. p. 258.—But see on the other hand *Marezoll*, ibid. p. 296.

(*b*) Nov. 7. c. 3. § 2.—Contra: *Meissner*, l. c. § 198.—*Fritz*, Erläuterungen. p. 443. Tüb. krit. Z. Vol. 2. p. 115.—On the commencement of this mortgage, see *Rosshirt*, Gem. Deutsch. Civ. R. Vol. 2. § 311. note 3.

(*c*) By *prædium urbanum* is here meant not only every building, but also every open place not designed for raising produce. fr. 2. D. 20. 2. (Marcianus) "Pomponius libro quadragesimo variarum Lectionum scribit: non solum pro pensionibus, sed et si deteriorem habitationem fecerit culpa sua inquilinus, quo nomine ex locato cum eo erit actio, *invecta et illata pignori erunt obligata*."—fr. 3. and fr. 4. (quoted above, p. 338. note *d*.)—fr. 5. D. ibid. (Idem) "Pomponius libro tertio decimo variarum Lectionum scribit: si *gratuitam* habitationem conductor mihi præstiterit, *invecta a me domino insulæ pignori non esse*. § 1. *Item illud, inquit, videndum est, an voluntate domini inducti pignus ita possit, ut in partem debiti sit obligatum?*" § 2. (quoted p. 376. note *b*.)—fr. 6. D. ibid. (Ulpianus) "Licet in prædiis urbanis *tacite* solet conventum accipi, *ut perinde teneantur invecta et illata, ac si specialiter convenisset*, certe libertati hujusmodi pignus non officit. Idque et Pomponius probat; ait enim: manumissioni non officere ob habitationem obligatum."—fr. 7. D. ibid. (quoted above, p. 338. note *d*.)—fr. 8. D. ibid. (Paulus) "Cum debitor gratuita pecunia utatur, *potest creditor de fructibus rei sibi pignoratæ ad modum legitimum usuras retinere*."—fr. 32. D. 20. 1. (Scævola) "Debitor pactus est, *ut quæcunque in prædia pignori data, inducta, invecta, importata, ibi nata paratave essent*, pignori essent; eorum prædiorum pars sine colonis fuit, eaque actori suo colenda debitor ita tradidit, assignatis et servis culturæ necessariis. Quæritur: An et Stichus villicus, et ceteri servi ad culturam missi, et Stichi vicarii obligati essent? Respondi, eos duntaxat, qui hoc animo a domino inducti essent, *ut ibi perpetuo essent*, non temporis causa accommodarentur, obligatos."—fr. 11. § 2. D. 20. 4.—const. 5. C. 4. 65.—const. 5. C. 8. 15.—*Weber*, Versuche. No. 2.

(*d*) By *prædium rusticum* is here meant only a piece of ground designed for raising produce (§ 309. and Ed.'s note thereon). fr. 7. pr. D. 20. — fr. 24. § 1. D. 19. 2. (Paulus) "Si colonus locaverit fundum, res posterioris conductoris domino non obligantur, *sed fructus in causa pignoris manent, quemadmodum essent, si primus colonus eos percepisset*."—*Dabelow*, Concurs. p. 191.

(*e*) fr. 11. § 5. C. 13. 7.—fr. 24. § 1. fr. 33. D. 19. 2.

for the restoration of such building, and has been actually expended for that purpose. This legal right of mortgage takes effect from the time when the rebuilding is begun;[a] but no such tacit mortgage arises in favour of one who loans money for the erection of a building in the first place, or for the repairing of one which is still standing; neither does it exist in favour of one who has merely furnished materials or labour on credit for the restoration of a building.[b]

4. To pupils, on the thing which a tutor or a third party has bought for himself with their money,[c] provided such money was not given to the tutor or third party as a loan; for in that case the pupil has no right of mortgage in the thing which is bought with it, unless a special agreement was made to that effect.[d]

5. To the *legatarii* and *fidei-commissarii*, on account of their legacies or trusts, on that portion of the estate which the heir who is burthened with the legacy or trust has received from the testator; but not also on his own property. If several are burthened with the legacy or trust, the right of mortgage applies *pro rata* to each one's portion of the inherited estate.[e]

TITLE THIRD.

EFFECTS OF A PAWN OR MORTGAGE.

I. In General.

A. Rights of the Mortgagor.

§ 348. He who has granted to another a right of pawn or mortgage in a thing, whether for his own debt or for the debt of a third party, remains afterwards as before proprietor of the thing.[f] Consequently:

(*a*) fr. 1. D. 20. 2.—fr. 24. § 1. D. 42. 5.—(Ulpianus) "Divus Marcus ita edixit: '*Creditor, qui ob restitutionem ædificiorum crediderit, in pecunia, quæ credita erit, privilegium exigendi habebit.*' Quod ad eum quoque pertinet, qui redemtori domino mandante pecuniam subministravit."—fr. 21. D. 13. 7.—*Dabelow*, l. c. p. 197. 616.—*Bülow*, Abh. Vol. 1. No. 4.—*Schröter* in the Z. für Civ. R. u. Proc. Vol. 1. p. 340.

(*b*) But he may of course require the debtor to mortgage the building for the security of his loan.

(*c*) fr. 7. pr. D. 20. 4.—fr. 3. pr. D. 27. 9.—const. 6. C. 7. 8.—Many are of opinion that this mortgage belongs also to minors, on account of fr. 2. D. 26. 9. and const. 3. C. 5. 51.—*Glück*, Comm. Vol. 19. p. 47. 288.—But see contra: *Löhr* in his Mag. Vol. 4, (2.) p. 140.—*Buchholtz*, Qui potiores sunt in pignore. Konigsberg, 1829. p. 36. and his Versuche. No. 19.

(*d*) const. 17. C. 8. 14. "Quamvis ea pecunia, quam a te mutuo frater tuus accepit, comparaverit prædium, tamen nisi specialiter vel generaliter hoc tibi obligaverit, tuæ pecuniæ numeratio in causam pignoris non *deduxit*. Sane personali actione debitum apud Præsidem petere non prohiberis."

(*e*) const. 1. 3. C. 6. 43.—Nov. 108. c. 2.—*Löhr* in the Archiv Civ. Prax. Vol. 5. p. 208.—*Hepp*, l. c. (§ 342. note *d*.)—Some are of opinion that this mortgage, being in itself indivisible, does not apply to the share of each co-heir merely pro rata; e. g. *Becker* de actione hypothecaria. Greifswald, 1768. and *Glück*, Comm. Vol. 19. p. 179 seqq. But see contra: *Gesterding*, Nachforschungen. Vol. 3. p. 201.

(*f*) fr. 35. § 1. D. 13. 7. (Florentinus) "Pig-

1. He may use the thing pledged, and reap the fruits thereof; unless, by special agreement, this right of reaping the fruits has been transferred to the mortgagee in lieu of drawing interest. Such an agreement is called *antichresis*,[a] or *pactum antichreticum*, and may be concluded either expressly or tacitly. It is considered to be tacitly made, when the possession of a thing producing fruit is given to the creditor as a pledge; and in such case this peculiarity holds, that the creditor may retain the fruits of the thing pledged to the amount of the legal interest, even though no interest has been agreed upon.[b] 2. The mortgagor, moreover, if there be no agreement to the contrary,[c] has the right of alienating the thing pledged; but this does not affect the mortgage on it.[d] Still the alienation of a moveable thing given as a pawn or specially mortgaged, when done without the knowledge and consent of the pawnee or mortgagee, is regarded as a theft.[e] 3. The pledgor who at the time of granting the pledge was not the true proprietor of the thing, but merely a *possessor ad usucapionem*, may continue and complete the prescription of it, while it is in the hands of the pawnee or mortgagee.[f]

nus, *manente proprietate debitoris*, solam possessionem transfert ad creditorem; potest tamen et precario et pro conducto debitor re sua uti." — fr. 21. § 2. D. 20. 1. (Ulpianus) "Quidquid pignori commodi sive incommodi fortuito accessit, id *ad debitorem* pertinet."—fr. 56. pr. D. 47. 2. (Gaius) "Si pignore creditor utatur, *furti* tenetur."—Comp. § 6. J. 4. 1.

(*a*) fr. 11. § 1. D. 20. 1. (quoted above, § 338. note *b*.)—fr. 33. D. 13. 7.—*Hanker*, Diss. de vera indole et natura antichreseos. Giessen, 1783.—*Wichelhausen*, Analecta quædam ex antichresi collecta. Gottingen, 1792.—*Glück*, Comm. Vol. 14. § 870.—*Gesterding*, Pfandrecht. § 30.

(*b*) fr. 8. D. 20. 2. (quoted p. 381. note *c*.) —*Glück*, Comm. Vol. 14. p. 50. adopts another opinion, on account of fr. 7. D. 13. 7. here following. (Paulus) "Si autem tardius *superfluum* restituat creditor id quod apud eum depositum est, ex mora etiam *usuras* debitori hoc nomine præstare cogendus est." —With regard to the cases in which it is the duty of the antichretic mortgagee to render an account of the fruits reaped and to reduce the principal sum by the surplus of the fruits over what is sufficient to pay the legal interest, we must distinguish: 1. The case where the possession of a thing bearing fruit is pledged to a creditor as security for a loan for which no interest is agreed to be paid. Here he can retain the fruits, but only to the amount of legal interest; hence he has always to render an account (fr. 8. D. cit.) And 2. The case where a creditor to whom an antichresis is expressly given for a loan bearing interest. Here three different cases occur: *a*. Where the *natural fruits* of a piece of ground are assigned to the creditor instead of interest. In this case, as a general rule, he is not obliged to render any account, (const. 17. C. 4. 32.), unless he has agreed to do so (fr. 1. § 3. D. 20. 1.), or the antichretic contract has been made for the purpose of concealing usury (const. 26. § 1. C. 4. 32.) *b*. Where certain *money proceeds* are assigned to the creditor. In such case he must always render an account, and allow the surplus to be deducted from the principal; because it amounts to the same thing, whether the creditor receives his interest in cash from the debtor, or by way of assignment. *c*. Where no fruits are assigned to the creditor, but only a *usus rei* (e. g. the use of the debtor's house as a dwelling). In such case, if he uses the thing himself, he is not bound to render account; while he is obliged to do so when he lets it to another (const. 14. C. 4. 32.).—Comp. *Seuffert*, Erört. II. No. 21.

(*c*) fr. 7. § 2. D. 20. 5. (Marcianus) "Quæritur, *si pactum sit a creditore, ne liceat debitori hypothecam vendere vel pignus*, quid juris sit, et an pactio nulla sit talis, quasi contra jus sit posita, ideoque veniri possit? Et certum est, *nullam esse venditionem, ut pactioni stetur*."—Respecting this fragment, see: *Glück's* Comm. Vol. 16. p. 57.—*Lauk* in the Z. für Civ. R. u. Proc. Vol. 5. p. 13.

(*d*) fr. 18. § 2. D. 13. 7.—const. 12. C. 8. 28. —const. 15. C. 8. 14. (all quoted above, p. 374. note *b*.)—Nov. 112. c. 1.—*Gesterding*, Pfandrecht. § 23.—Comp. *Bülow*, Abh. Vol. 1. No. 1.

(*e*) fr. 19. § 6. fr. 66. pr. D. 47. 2.—fr. 3. § 1. D. 47. 20.—*Löhr* in the Archiv Civ. Prax. Vol. 14. p. 168.

(*f*) fr. 16. D. 41. 3. (quoted above, § 232. note *b*).

B. Rights of the Mortgagee.[a]

1. *In general.*

§ 349. The rights that belong to the pawnee or mortgagee are as follows: 1. He has a *real* right in the thing pledged, and in every case of pawn constituted by agreement he has also a *possessio ad interdicta*;[b] but in case of a prætorian right of pawn or mortgage, he has only the detention;[c] and on a mere mortgage (hypothecation) he has neither possession nor detention. 2. He may retain the thing given to him as a pledge, until the debt is entirely discharged;[d] and since a pawn or mortgage adheres as a real right to the thing which is pledged, he can enforce it against every possessor.[e] 3. Furthermore, he may again pledge to another the thing pledged to himself, or rather the right of pawn or mortgage which he holds with respect to it; and this gives rise to the so-called after-pledge or *subpignus*.[f] 4. Lastly, in case the debtor does not pay at the proper time, the pawnee or mortgagee has a right to sell the thing and pay himself out of the proceeds (*jus distrahendi pignus*). This right he retains until his claim is fully satisfied;[g] it may indeed be subjected to certain restrictions,[h] but it cannot be entirely withheld from him.[i] On the other hand, every agreement is null and void which provides that the thing pledged shall pass to the creditor without any sale or appraisement, or that the debtor shall forfeit his right of redemption if he fails to pay at the proper time (*lex commissoria s. pactum commissorium*).[k]

(*a*) *Gesterding*, Pfandrecht. § 24.

(*b*) fr. 16. D. 41. 3. and fr. 3. § 15. D. 10. 4. (quoted p. 243. in note *a*).

(*c*) fr. 3. § 8. D. 43. 17.—fr. 3. § 23. D. 41. 2.

(*d*) This *right of retention* belongs to the creditor not only on account of the principal debt for which the pawn was given, but also on account of the interest on it and the expenses employed upon the thing while in his possession. fr. 8. pr. § 5. D. 13. 7. The creditor may avail himself of the right of retention against the debtor and his heirs, though not against later pledgees, even on account of a claim which stands in no connexion whatever with that for which the pledge was given. const. 14. C. 8. 27. But this right of retention does not entitle the creditor to effect a sale of the thing.

(*e*) fr. 16. § 3. D. 20. 1.—const. 14. C. 8. 14. "Distractis a debitore pignoribus, creditores potestatem habere, utrumne personali obligatos sibi, *an pignora possidentes in rem actione convenire velint, non est incerti juris.*" Respecting the effects of a pledge on incorporeal things, see above, § 338.

(*f*) See § 338. in fin.

(*g*) const. 6. C. 8. 28. "Quamdiu non est integra pecunia creditori numerata, *etiamsi pro parte majore eam consecutus* sit, distrahendi rem obligatam *non amittit* facultatem."

(*h*) fr. 4. D. 13. 7.

(*i*) Hence the agreement '*ne omnino pignus distrahatur*' is invalid. fr. 4. D. 13. 7. On the other hand the pledgee cannot be compelled to sell the pledge. fr. 6. pr. D. 13. 7.

(*k*) const. 3. C. 8. 35. Before the time of Constantine, by whom this constitutio was issued, the pactum commissorium was allowed also with respect to pledges. — *Cicero* ad Div. 13. 56.—fr. 81. pr. D. 18. 1.—fr. 16. § 9. D. 20. 1.—*Paulus*, Sent. rec. 2. 13.—Comp. in general: *Riccius* de pacto commissorio circa pignora. Jena, 1743.—*Glück*, Comm. Vol. 14. § 869.—*Weber*, Versuche. No. 5.—*Gönner*, Jur. Abh. Vol. 1. No. 7.—*Seuffert*, Erört. II. No. 20.—*Gesterding*, Pfandrecht. § 32.—According to the canon law, a pactum commissorium confirmed by oath must be considered as valid. c. 2. X. 2. 21. This last passage is not contradicted by c. 7. X. 3. 21.—The

2. *Sale of the Pledge.a*

§ 350. With respect to the sale of the thing pledged to satisfy the creditor, we have to consider, first the form, and then the effect of it.

1. As regards the *form*, the creditor may sell the pledge privately, i. e. without judicial authority;[b] still he must advertise the sale publicly, and give the debtor particular notice of it. Moreover, in so doing, he must observe certain periods of time, which the Roman law has fixed as follows: *a.* When on granting the mortgage it has been expressly agreed 'UT DISTRAHATUR PIGNUS,' in case the debtor fails to pay when the time comes round, the creditor may at once proceed to the sale of the pledge.[c] *b.* When on the other hand, nothing special had been settled with regard to the sale, or the agreement was 'NE DISTRAHATUR PIGNUS,' the creditor was obliged according to the old law, after the day of payment had passed, to notify the debtor three times of his intention to sell, before he could proceed to make the sale.[d] According to a later ordinance of Justinian, if the parties had not otherwise provided, a single notice was sufficient; but the creditor could not effect a sale until the expiration of two years thereafter.[e] *c.* If the pledge is offered for sale in the proper manner, and no acceptable purchaser is found, the creditor can apply to the ruler to have the thing adjudged to himself at its value, as appraised by the court (*impetratio dominii*). Still, even in this last case, the debtor has a right of redemption for two years thereafter.[f]*

lex commissoria, we may add here, is that accessory agreement by which two contracting parties conclude that the one shall be freed from his principal obligation, if the other fail to perform his within a certain time. Generally speaking, parties are at liberty to make such agreements; but in respect to pledges they are prohibited.

(*a*) *Pauli* Sent. rec. 2. 5.—Dig. 20. 5.—Cod. VIII. 23. 28. 29. 30. 34.—*Gesterding*, Pfandrecht. § 25–28.—and especially *Müller*, Civ. Abh. Vol. 1. No. 3.

(*b*) const. 4. C. 8. 28.—const. 9. C. ibid. (quoted p. 375. note *c.*)—The sale of a *pignus ex causa judicati captum* can be made only by the court itself; for it is a continued act of judicial execution. See Cod. 8. 23.—*Rosshirt*, Gem. Deutsch. Civ. R. Vol. 2. p. 211.

(*c*) § 1. J. 2. 8.—const. 3. § 1. C. 8. 34.—Comp. *Bopp* in the Archiv Civ. Prax. Vol. 14. p. 266.—*Wening* in the Z. für Civ. R. u. Proc. Vol. 1. No. 3. art. 18.—*Müller*, l. c. § 4.—*Fritz*, Erläut. p. 459 seq.—*Rosshirt*, l. c. II. p. 210.

(*d*) *Pauli* Sent. rec. 5. 1.—fr. 4. 5. D. 13. 7. Some are of opinion that this period of two years, which the creditor had to wait before he proceeded to a sale of the pledge, commenced at the time when the first notice was given to the debtor; while others suppose that it did not begin to run until the third notice was given. According to the latter opinion, the time which the creditor must wait would be extended twenty days, as the notices were repeated at the end of ten days.

(*e*) const. 3. § 1. C. 8. 34. If therefore it had been agreed '*ne distrahatur pignus*,' such threefold notification was still requisite, and the creditor could not proceed to the sale until the expiration of two years after the last notice. *Zimmern* in the Z. für Civ. R. u. Proc. Vol. 1. p. 51.—*Müller*, l. c. § 5.—*Fritz* zu Wening. p. 467.—Comp. *Thibaut*, System. 7th Ed. § 649 seqq.

(*f*) const. 3. § 2–6. C. 8. 34.—fr. 15. § 3. D. 42. 1.—const. 2. C. 8. 23.—*Reinhardt*, Verm. Aufsätze. I. No. 16.

* Among the Romans, the sale of a thing pledged could be effected by the creditor privately, and without the concurrence of a court. Still such a sale presupposed that the creditor had either obtained a judgment against the debtor, or at least had notified the latter of his intention to sell, and had waited two years after such notice. The

2. The *effects* of a sale of the thing pledged, when made by the pledgee in the manner prescribed, and with the observance of the legal terms,[a] are as follows: *a.* The creditor may demand complete satisfaction out of the purchase money. If there is a surplus, it must be paid over to the debtor[b] or to the next mortgagee;[c] if, however, the sum obtained by the sale is insufficient to meet the claims of the creditor, the debtor continues to be responsible to him for the deficiency.[d] *b.* The right of property in the thing pledged, when sold by a creditor entitled to sell it, passes by delivery to the purchaser, provided the pawnor or mortgagor has it.[e] The purchaser in this case acquires the thing free from any previous pawn or mortgage; for these terminate as a consequence of the sale.[f]

(*a*) The sale is entirely void, in case these periods are not observed, or in case the creditor had no right of sale. Cod. 8. 30.—*Müller*, l. c. § 8.

(*b*) fr. 8. § 5. fr. 24. § 2. fr. 35. pr. fr. 42. D. 13. 7.—fr. 9. pr. D. 20. 5. (Paulus) "Quæsitum est, si creditor ab emtore pignoris pretium servare non potuisset, an debitor liberatus esset? Putavi, si nulla culpa imputari creditori possit, manere debitorem obligatum, quia ex necessitate facta venditio non liberat debitorem, *nisi pecunia percepta.*"—const. 3. § 4. C. 8. 34.

(*c*) fr. 12. § 5. fr. 20. D. 20. 4.—const. 3. § 4. C. 8. 34.—*Wening*, Civ. R. 3d Ed. § 172.

(*d*) const. 3. § 4. C. 8. 34. *Comp.* const. 3. C. 8. 28.—const. 9. C. *ibid.* (quoted above, p. 375. note *c*).

(*e*) For the purchaser can obtain no better right than the mortgagor had himself; and consequently he acquires only a bonæ fidei possessio, where the mortgagor's right consisted only in such possession. arg. fr. 54. D. 50. 17.

(*f*) const. 13. C. 8. 28.—const. 1. C. 8. 30.—const. 6. 7. C. 4. 10.

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creditor was required to inform his debtor of the time and place of the sale; but he was not obliged to sell it by auction, neither was he permitted to buy it himself, either directly or indirectly. In such sales the creditor was considered to act as the mandatary of the debtor; he had therefore to proceed *bona fide*, and to take every precaution to promote the debtor's interests. It was on account of his being regarded as a mandatary, that an action for eviction could not be maintained against *him*, but only against the pledgor; unless he had sold *mala fide*, or without any right to sell, in which case he was himself responsible for all the damages that resulted from the sale. A judicial sale of a pledge was required only with respect to things of a debtor which had been seized by a court for the execution of a judgment; and in this case the sale might take place at the expiration of two months after the seizure, and the creditor was admitted as a purchaser. fr. 12. pr. D. 20. 5.—const. 2. C. 8. 23. The principle which generally prevailed in Germany, even before the introduction of the Roman law, was that pledges must be sold under authority of a competent court, or at least by public auction; and this principle applies there to the present day.

We have already remarked, that the Roman system of pawn and mortgage had attained but a low degree of development; if any additional proof of the truth of this observation were needed, it would be found in the fact that a private sale of the pledge was permitted. Such a disregard of the rights of other pledgees as that which is sanctioned as law by this admission of a private sale, appears to us, with our notions of credit on things, as utterly unjust. And if any thing could render this want of security a greater hardship to mortgagees, it was effected by the provision that authorized an heir who assumed a debtor's inheritance *sub beneficio inventarii*, to dispose of the things he had inherited, and to pay off the creditors to the extent of the estate left him, in the order in which they happened to call upon him for payment, without any regard to their rights of mortgage or priority. It seems to us that in this way the vigilance of a creditor must have been often disproportionately rewarded at the expense of the unsatisfied creditors, who were exposed to all the difficulties of a suit for priority, in order to rescue from other creditors what they had unjustly obtained.

*II. Concurrent Mortgages.**

A. Priority.[a]

1. *General Rule.*

§ 351. If one and the same thing, or one and the same estate, is wholly pledged to each of several creditors,[b] and does not suffice for the complete satisfaction of all, the question arises, Which of the concurrent mortgages is to have the preference over the others? The

(*a*) Dig. 20. 4.—Cod. VIII. 18. 19. 20.—Nov. 97. c. 3. 4.—*Gesterding*, Pfandrecht. § 33.

(*b*) But it is otherwise in the case where one and the same thing is pledged to several persons *jointly*; for then it secures to each one only the amount of his share (*pro rata crediti*). fr. 16. § 8. D. 20. 1.

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* We will insert here a few general remarks respecting the Roman doctrine of pawn and mortgage.

The pawn or mortgage, except where its object is a claim, is always a *jus in re* (scil. *aliena*); hence it holds good even after the thing, whether specially or generally pledged, has passed into the possession of a third party (*Res transit cum suo onere*). Tacit rights of pledge, i. e. those granted by law, are always *hypothecæ* (mortgages); while those established by a voluntary act of a party or by a judicial order, may be either *pawns* or *mortgages*. The agreement by which a thing is pawned (*contractus pignoratitius*) belongs to the class of so-called *real* contracts; because here, as the Romans said, *obligatio re contrahitur*, i. e. the delivery of the thing pledged is requisite to the completion of the contract; while the agreement for mortgaging a thing (*pactum hypothecæ*) requires nothing more than mutual consent (*nuda conventio, merus consensus*). As to the distinction which the Civil law makes between *pignus* and *hypotheca*, it must not by any means be supposed that the former applies only to *mobilia*, and the latter to *immobilia*; for a pignus as well as a hypotheca may apply to either of them. According to the principles of the Civil law, a pledge must be considered as a *pawn*, where the pledging of the thing is accompanied by the delivery of possession; and where it is not so accompanied, it is called a *mortgage*. Such possession alone, however, does not give the creditor a right of preference, any more than a special mortgage would give him such a right over a general mortgage. In cases where several rights of pawn and mortgage concur, i. e. where the same thing is pledged *in solidum* to several creditors, their priority is to be decided either by the privileges attached to their claims, by the degrees of evidence, or by their respective ages;—whence it is said that a preference arises, either as a *favor personæ* (as e. g. the public treasury, the wife, &c.), or as a *favor formæ* (*pignus publicum, quasi-publicum*), or lastly as a *favor causæ* (as e. g. in the case of a *debitum in rem versum*). The rights of preference are of special importance in classifying the creditors of a bankrupt, as the estate is distributed among them according to their rank: hence the doctrine of priority will demand more of our attention when we come to treat of the subject of bankruptcy. But the right of priority is also of great practical importance in all other cases where a collision may occur between concurrent mortgages, as will be seen from the following statement: 1. A prior mortgagee is at liberty to sell the thing pledged, and his sale will terminate all other rights of mortgage. 2. A posterior mortgagee, on the contrary, cannot sell without satisfying the prior creditor's claim, unless it can be met out of the proceeds of the sale; if he sells without satisfying the prior creditor, the mortgage of the latter is not affected by the sale, and the thing still remains subject to it. 3. A prior creditor may sue any possessor of the

rule which generally applies here is, that the earlier pawn or mortgage has the preference over the later.[a] This rule, however, is subject to the following exceptions: 1. When a pawnee or mortgagee repledges to another a thing that is pledged to himself, the *creditor creditoris* always has the preference.[b] 2. When the debt for which the later pledge is granted, was contracted in order to preserve the thing already pledged to another from perishing, the later pledge has the preference over the earlier.[c] 3. Those mortgages to which a special preference is given by law (*privilegium, jus prælationis*), invariably take precedence of all others, including those of an earlier date (§§ 352, 353).

2. *Privileged Mortgages.*

a. Legal.

§ 352. A right of precedence is given to some *legal* and to some *conventional* mortgages.[d]

Of the *legal* mortgages mentioned above (§§ 346, 347), only the following are privileged: 1. That of the *fiscus* (public treasury), on account of arrears of taxes,[e] and for primipilar debts (i. e. for its claims

(*a*) fr. 11. pr. § 1. fr. 12. § 2. D. 20. 4.—const. 8. C. 8. 18.

(*b*) See above, § 338. in fin.—It is scarcely necessary for us to observe, that the sub-pledgee has a right to sell the pledge; but of course he is not entitled to satisfy his claims to a larger amount than that for which it was given to the original pledgee. On the other hand, he must restore it to the debtor, as soon as the latter has paid off the original pledgee. Moreover, if the debtor is informed of the thing's being repledged, he is not allowed to pay off the original pledgee without the consent of the sub-pledgee. This last opinion prevails in practice; but it is opposed by many writers, who, from the fact that it is founded upon an analogous extension of the principles which apply to the cession of a claim, argue that it ought to be confined to the cases where *claims* are pledged.

(*c*) fr. 5. D. 20. 4. (Ulpianus). "Interdum posterior potior est priori; utputa *si in rem istam conservandam impensum est*, quod sequens credidit, veluti si navis fuit obligata, et ad armandam eam vel reficiendam ego credidero."—*fr.* 6. pr. D. ibid. (Idem) "*Hujus enim pecunia salvam fecit totius pignoris causam.* Quod poterit quis admittere, et si in cibaria nautarum fuerit creditum, sine quibus navis salva pervenire non poterat."—Comp. *Runde*, Deutsch. Priv. R. § 215.—*Mittermaier*, Grundsätze des Deutsch. Priv. R. 4th Ed. § 220.

(*d*) *Runde* de historia, indole, ac vi remediorum securitatis, quibus jure Romano prospectum est creditoribus per privilegia personalia, hypothecas tacitas, et privilegia hypothecarum. Gottingen, 1794.—*Dabelow*, Concurs. cap. 8. 11.—*Schweppe*, Concurs. § 70 seq.—*Gesterding*, Pfandrecht. § 31.—*Neustetel* and *Zimmern*, Röm.-rechtl. Unters. p. 282. 337.—*Seuffert*, Erört. II. No. 25.—*Göschen*, Grundriss. p. 179–186.

(*e*) const. 1. C. 4. 46.—const. 3. C. 7. 73.—*Kind*, Quæst. for. 2d Ed. Vol. 4. cap. 24.

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thing pledged to him, and demand its surrender; and hence he can require a posterior mortgagee who is in possession, to deliver it up to him. 4. It is only where the rights of several mortgagees are equal, that the possessor has a preference over the others according to the rule, *Possidentis conditio melior est;* and here he has a right even to sell the thing, and thereby terminate all other mortgages.

against pay-masters and commissaries of the army).[a] It is true that the treasury has a privileged mortgage on the property of all other persons that contract with it, on account of its claims arising from such contracts; it has however no preference over elder mortgages, but merely over those of the same date: hence this privilege refers more particularly to such parts of the debtor's property as he has acquired after making his contract with the treasury.[b] 2. The mortgage of the wife on the property of her husband, on account of her *dos*.[c] This privilege, which was first introduced by Justinian, does not pass over like the mortgage itself to the wife's heirs, not even to her descendants; neither does it belong to any other persons who are entitled to demand the restoration of the *dos*; but is an eminently personal right of the wife, applying to her own suit for restitution of the *dos*. It is only in the single case where children by a former marriage claim their mother's *dos* as against their step-mother, that they are entitled to their natural mother's *privilegium dotis*.[d] A betrothed woman has not this privilege, if the *dos* be given, and the marriage does not take place.[e] 3. The mortgage in favour of a pupil, on the thing bought by his tutor or a third party for himself with the pupil's money.[f] 4. And lastly, the mortgage of one who has lent money for the restoration of a house

(*a*) const. 3. C. 12. 63.—Cod. Theod. 7. 4.—Cod. Just. 12. 38.—*Hagemann*, Pract. Erört. Vol. 8. Div. 1. No. 27. Contra: *Thibaut*, System. § 657. and *Wening*, Civ. R. § 177.—The *primipilares* had the control of the contributions and provisions for the supply of the army, which were furnished by the subjects in the provinces, and delivered at the public granaries, &c. (exactio annonæ militaris et transactio ad horrea publica). "Primipilus," says *Huber* in his Præl. sec. Inst. et Dig. 3d Vol. p. 1054. "erat castris Romanis primus cujusque legionis centurio, sub cujus etiam cura, posteriori tempore, fuit *annona militaris*." Comp. *Brissonius* de V. S. voce *Primipilus*.

(*b*) fr. 28. D. 49. 14.—const. 2. C. 7. 73.—Fragm. veteris Icti de jure fisci. § 5. "Bona eorum, qui cum fisco contrahunt — — — — velut pignoris jure fisco obligantur; non solum ea, quæ habent, *sed ea, quæ postea habituri sunt*."—*Meissner*, Pfandrecht. Vol. 1. § 100–104.—*Unterholzner*, Abh. No. 2.—Contra: *Thibaut*, l. c. and *Spangenberg* in the Archiv Civ. Prax. Vol. 11. p. 451. But see *Göschen*, l. c. p. 181.

(*c*) const. 12. § 1. C. 8. 18.—Nov. 97. c. 2. 3.—Nov. 109. c. 1.—*Tigerström*, Dotalrecht. Vol. 2. § 69–75.

(*d*) § 29. in fin. J. 4. 6.—const. 12. § 1. C. 18. 8.—Nov. 91. cap. 1. Auth. *Si quid*, C. 8. 18.—const. un. C. 7. 74. "Scire debes, privilegium dotis, quo mulieres utuntur in actione de dote, *ad heredem non transire*."—*Löhr* in the Archiv Civ. Prax. Vol. 5. p. 290. The general opinion, which seems also to prevail in practice, is that the privilegium dotis *always* passes to the descendants of the wife. This opinion has been adopted and defended by *Kamptz* in his Brautschatz-Privilegien. Berlin, 1811. as also by *Glück*, Comm. Vol. 27. p. 170 seqq. and *Buchholtz*, Qui potiores sunt in pignore. p. 16–27.—As to the case referred to in the text, Dr. Rosshirt thinks that such collision between the children of two different marriages cannot occur; for the reason that the general preference which is given to age must apply here.

(*e*) She has not even a legal mortgage; for this simple reason, that there is no *dos* where there is no marriage. The legal mortgage which is given to secure the *dos*, does not arise until after the marriage takes place.—As to Jewish wives, the privilegium dotis cannot be denied to them. arg. const. 8. C. 1. 9.—*Dabelow*, l. c. p. 247.—*Danz*, Handb. des Deutsch. Priv. R. Vol. 7. § 643.—*Gesterding*, Nachforschungen. Vol. 3. p. 209. Another opinion is entertained by *Thibaut*, l. c. § 643., on account of Nov. 109. c. 1.; and likewise by *Seuffert*, Erört. II. p. 114. and *Runde*, Deutsch. Priv. R. § 643.

(*f*) fr. 3. pr. D. 27. 9.—fr. 7. pr. D. 20. 4.—const. 6. C. 7. 8.

(*ad restitutionem ædium*), provided that the money has been actually expended for that purpose.[a]

b. Conventional.

§ 353. Of *conventional* mortgages, all those are privileged which are founded on a credit to be used, and which actually is used, for the benefit of the thing pledged (*versio in rem*). For wherever a *versio in rem oppignoratam* is made by a debt contracted on the security of a pledge, the pledge thus given has the preference, as far as the *versio in rem* extends, over all others, legal as well as conventional, even though they should be older or public mortgages.[b] To privileged mortgages of this class belong especially: 1. The mortgage granted in the thing itself, at the time of contracting a debt designed and actually employed for its benefit; as where a loan of money is given, or work is done or materials furnished on credit, for the purchase of a thing or a *militia*, for building or repairing a house, or for fitting out a ship.[c] 2. The mortgage which the vendor of a thing has reserved to himself at the time of the sale, as a security for the payment of the price.[d]

(*a*) fr. 1. D. 20. 2.—fr. 24. § 1. D. 42. 5. (quoted p. 382. note *a*.)—Nov. 97. c. 3.—*Dabelow*, l. c. p. 197. 616.—*Heise*, Grundriss. 3d Ed. p. 61. note 27.—*Schweppe*, Jur. Mag. No. 1. art. 6.—*Zimmern*, l. c.—*Buchholtz*, l. c. p. 27.

(*b*) This applies also to the *legal* mortgages of this description, which have been noticed in § 352. Nos. 3. and 4.

(*c*) fr. 5. 6. 21. § 1. D. 20. 4.—const. 7. C. 8. 18.—const. 17. 27. C. 8. 14.—Nov. 53. c. 5.—Nov. 97. c. 3. 4.—*Rumpel*, Diss. de pecunia ad emendum credita privilegiata et non privilegiata. Giessen, 1772.—*Pfizer*, Diss. de pignore privilegiato, quod mutuando ad rem comparandam acquiritur. Stuttgart, 1792. —*Schweppe*, Concurs. § 70.—*Zimmern*, Röm. rechtl. Abh. p. 282. 337.—*Gesterding*, Pfandrecht. p. 278.—*Buchholtz*, l. c. p. 27.—*Göschen*, l. c. § 184.—*Militiæ*, it may be observed, were certain offices of the imperial court (*militiæ palatinæ*), which yielded revenues, and descended to the heirs of the occupants, and might be sold by them. Although there are immense numbers of offices in the German states, none of them possesses this peculiarity of the Roman *militiæ*, viz. that of being inheritable and saleable; hence the privilege attached to those *militiæ* cannot be applied to loans made for obtaining any modern offices or dignities, which, although they may perhaps be purchasable, are at least excluded from the market as well as from transmission by inheritance. Jus singulare strictissime interpretandum est. — The description of the offices in question given by *Huber*, l. c. p. 1056., is as follows: "Per militiam intelligitur hic *locus in Schola agentium in rebus*, quæ fuit apud Cæsares posteriores, *qui* ministerio publico et extraordinario rerum gerendarum vacabant; et quasi *seminarium* reipubl. habebatur, ut ex eorum numero quoque Magistratus electi videantur. Hi interim commoda quædam et salaria percipiebant, eaque loca fuerunt in commercio, ut etiam legari vendique potuerint." Comp. *Brissonius*, l. c. sub voce *Militia*.—*Hugo*, R. G. p. 1133.—*Averanii* Lib. II. Interpretatt. jur. cap. 17.

(*d*) Arg. const. 7. C. 8. 18. "Licet iisdem pignoribus multis creditoribus diversis temporibus datis, priores habeantur potiores, tamen cum, *cujus pecunia prædium comparatum probatur, quod ei pignori esse specialiter obligatum statim convenit, omnibus anteferri, juris auctoritate declaratur.*"—For the vendor is to be regarded here as one who has loaned the money for the purpose of purchasing the immoveable thing. *Thibaut*, Civ. Abh. p. 316.—Dr. *Rosshirt* contradicts this, but without any sufficient reason. Comp. his Gem. Deutsch. Priv. R. § 310. and *Glück*, Comm. Vol. 19. p. 311.—But see also *Weber* zu Höpfner. p. 558. note 6.—and *Braun*, Erörterungen. § 654.

c. Priority among Privileged Mortgages.

§ 354. When several privileged mortgages come into collision, the order of priority is as follows: 1. The public treasury, on account of taxes and primipilar debts, has the preference over all private creditors, not excepting elder mortgagees.[a] 2. The second in order is the wife, who on account of her *dos* has a preference over all other privileged mortgagees. In a case of concurrent dotal claims, the claims of the first wife and her children have a preference over those of the second wife.[b] 3. After the claims of the fiscus and the debtor's wife have been completely satisfied, those privileged mortgages come next whose loans have been given and used for the benefit of the thing pledged.[c] The priority of these among themselves generally depends on the age of their respective mortgages, except where the loan of a later mortgage has been made and used for saving the thing pledged from perishing.[d] But wherever the age of the mortgages is proved by documents, he who proves by a public or quasi-public document has the preference over every mortgagee whose means of proof is only a private instrument, though it be of older date.[e] 4. The last place among privileged mortgages is given to the public treasury on account of its ordinary claims arising from contracts (§ 352).

2. *Non-privileged Mortgages.*

§ 355. Next in order to the privileged mortgages are placed all those that are not privileged, and that without distinction as to whether they are legal or conventional. The right of priority among them is determined according to the following rules: 1. In the first place, their rank is to be settled by their respective ages; so that the earlier mortgage has the preference over the later:[f] except where the conventional mortgage or the loan to which the law has attached a mortgage, is proved by a public or quasi-public document; for then it has the precedence over any other non-privileged mortgage which is proved merely by a private instrument. Hence, in so far as the age of a mortgage is to be proved and established by documents against the other concurrent mortgages, he who can prove his mortgage, whether

(*a*) const. 1. C. 4. 46.—const. 4. C. 8. 15.—const. 3. C. 12. 63.—*Zimmern*, l. c. p. 303.—*Dabelow*, Concurs. p. 301. Concerning the different opinions as to whether the wife is entitled to a preference over the fiscus, see: *Glück's* Comm. Vol. 19. p. 269 seqq. and *Buchholtz*, Qui potiores sunt in pignore. p. 9. 41.

(*b*) const. 12. § 1. C. 8. 18.—Nov. 91. c. 1.—Nov. 97. c. 3.—Nov. 109. c. 1.—§ 29. J. 4. 6.

(*c*) Nov. 97. c. 3. 4.—*Thibaut*, System. 7th Ed. § 657.

(*d*) fr. 5. 6. D. 20. 4. (quoted § 351. note *e*.).

(*e*) const. 11. C. 8. 18.—Auth. *Si quis vult*, C. ibid.—*Thibaut*, Civ. Abh. p. 124.—*Zimmern*, l. c. p. 301.—Contra: *Schweppe*, Röm. Priv. R. Vol. 2. p. 333.

(*f*) fr. 11. pr. D. 20. 4.—const. 8. C. 8. 18.—Comp. fr. 2. fr. 12. § 2. 10. fr. 16. D. ibid.—*Buchholtz*, l. c. p. 56.

legal or conventional, by a public document (*ex instrumento publico*) or by a private document countersigned by three competent witnesses (*ex instrumento quasi publice confecto*), has the preference over him whose proof is only a private document.[a] Moreover, among several public mortgages, the earlier has the preference over the later.[b] 2. If the date or age of several mortgages be the same, that mortgagee has the precedence who is in possession of the thing pledged.[c] 3. But if none be in possession, and their rights are equal in every respect, the only course left is to satisfy each one as far as possible out of the thing pledged, in proportion to the amount of his claims.[d]

B. Rights of Prior Mortgagees.[e]

§ 356. A mortgagee who from any cause takes precedence of another, has the right to require that his entire claim be first paid out of the thing pledged, even though there be nothing left for one who comes after him. On this account he is also entitled to proceed to the sale of the pledge without the consent of the latter.[f] A posterior mortgagee, on the contrary, is in general not allowed to sell the thing without the consent of the prior one, unless the latter's claim will be satisfied from the proceeds of the sale.[g]

C. Rights of Posterior Mortgagees.

§ 357. A posterior mortgagee, however, may avoid a collision with a prior one, by obtaining the latter's place. Such a succession may be effected: 1. *With the consent of the prior mortgagee*, when he is paid off by the posterior one, and transfers to the latter his claim

(*a*) const. 11. C. 8. 18.—Auth. *Si quis vult*, C. ibid.—Respecting the sense and extent of const. 11. C. cit., opinions are very much at variance. See: *Hofacker*, Diss. de prærogativa pignorum publicorum. Tubingen, 1780.—*Klopper*, Diss. de hypotheca publica. Leyden, 1811.—*Thibaut*, Civ. Abh. p. 124–127.—*Zimmern*, l. c. p. 301.—*Schweppe*, Jur. Mag. No. 1. p. 149.—*Gesterding*, Pfandrecht. § 37.—*Glück*, Comm. Vol. 18. p. 278.—*Schirach*, Beiträge zur Anwendung des Rechts. No. 22.—*Hagemann*, Pract. Erört. Vol. 6. p. 295. 395.—Most civilians are of opinion that const. 11. cit. has reference only to the priority among *conventional* mortgages; while *Löhr* (see the Archiv Civ. Prax. Vol. 6. No. 6.) understands it as applying to *all* mortgages, whether conventional, legal, or judicial. This opinion is adopted by *Spangenberg*, in Strube's R. B. Vol. 1. p. 419.—*Gesterding*, Nachforschungen. Vol. 2. p. 443; on the other hand it is rejected by *Schweppe*, Concurs. 2d Ed. p. 133. and his Röm. Priv. R. Vol. 2. p. 333.—*Seuffert*, Erört. II. p. 140.—*Francke*, Beiträge. Vol. 1. p. 105.—*Buchholtz*, l. c. p. 53.—*Löhr* (in the Archiv Civ. Prax. Vol. 12. p. 161.) defends his opinion against the objections made to it; but his arguments have been again refuted by *Hepp* in Elvers' Jur. Z. 1830. No. 85–87.—Comp. also: *Sintenis*, Pfandrecht. Streitfragen. p. 103.—*Heimberger* in the Archiv Civ. Prax. Vol. 21. No. 2.

(*b*) Nov. 91. c. 1.

(*c*) fr. 10. D. 20. 1.

(*d*) fr. 16. § 8. D. 20. 1.

(*e*) *Löhr* in the Archiv Civ. Prax. Vol. 14. p. 167 seqq.

(*f*) const. 3. C. 8. 20. "*Quomiuus creditor, qui antea pignus* accepit, distrahat, non offerendo secundus priori debitum, interpellare non potest."—fr. 12. § 7. 10. D. 20. 4.—He cannot be compelled to sell the pledge. fr. 6. pr. D. 13. 7.—*Löhr* in his Mag. Vol. 4. p. 139.

(*g*) const. 8. C. 8. 18.—fr. 15. § 5. D. 42. 1. —*Bopp* in the Z. für Civ. R. u. Proc. Vol. 3. p. 234. and Vol. 15. p. 350.—Contra: *Schunck's* Jahrb. Vol. 17. p. 111. If at the request of a posterior creditor, a court has decreed a sale of the thing mortgaged, a prior creditor has no other means of preventing the sale, than by exercising the 'jus offerendi.'

and mortgage.[a] 2. Or *with the debtor's consent*, when a posterior mortgagee lends him money to be used and which actually is used for the purpose of satisfying a prior mortgagee, while he expressly reserves to himself the succession to the latter's rights;[b] or when he purchases the thing pledged, under the condition that the prior mortgagee shall be paid off with the purchase money, in which case the purchaser has a tacit right of succeeding to his place.[c] In like manner as a posterior mortgagee may obtain the place of a prior creditor by the consent of the debtor or of such creditor, so too this may be done by a chirographic creditor or a third party who was not a creditor before.[d] 3. Moreover, to every posterior mortgagee (but to him alone, and not to a chirographic creditor or a third party)[e] belongs the important *jus offerendi et succedendi*, i. e. the right of paying off the prior creditor *without his or the debtor's consent*, and of thereby succeeding to his rights to the extent of the sum paid, or deposited in court, in case the creditor refuses to accept it.[f] It is a peculiarity of this right, that the succession to the place and right of the satisfied creditor, always ensues ipso jure, without any cession being required;

(*a*) fr. 6. D. 18. 4. (Paulus) "*Emtori nominis etiam pignoris persecutio præstari debet*, ejus quoque, quod postea venditor accepit; nam beneficium venditoris prodest emtori." —const. 7. C. 4. 39. (quoted above, p. 372. note *f*).

(*b*) fr. 3. D. 20. 3.—fr. 12. § 8. 9. D. 20. 4.—const. 1. C. 8. 19. "Non omnimodo succedunt in locum hypothecarii creditoris hi, quorum pecunia ad creditorem transit. *Hoc enim tunc observatur, quum is, qui pecuniam postea dat, sub hoc pacto credat, ut idem pignus ei obligetur, et in locum ejus succedat.* Quod quum in persona tua factum non sit (judicatum est enim, te pignora non accepisse), frustra putas, tibi auxilio opus esse constitutionis nostræ ad eam rem pertinentis."—*Buchholtz*, l. c. p. 66. Here also belongs the case where a mortgagee permits the debtor to sell the thing mortgaged, for the purpose of enabling him to pay off another creditor's mortgage on a *different* thing.

(*c*) fr. 3. § 1. D. 20. 5.—fr. 17. D. 20. 4. (Paulus) "Eum, qui a debitore suo prædium obligatum comparavit, *eatenus tuendum, qualenus ad priorem creditorem ex pretio pecunia pervenit.*"—const. 3. C. 8. 19. "Si potiores creditores pecunia tua dimissi sunt, quibus obligata fuit possessio, quam emisse te dicis, ita ut pretium perveniret ad eosdem priores creditores, *in jus eorum successisti*, et contra eos, qui infirmiores illis fuerunt, justa defensione te tueri potes."—*Gesterding*, Pfandrecht. § 40.—*Glück*, Comm. Vol. 19. p. 374.—*Buchholtz*, l. c. p. 60.

(*d*) See the passages cited in the three foregoing notes.

(*e*) const. 10. C. 8. 18.—Also a chirographic creditor or third party (e. g. a surety) may pay off a mortgagee; but in order to be placed in his stead, a cession of his rights is necessary, and it remains at his option whether he shall make such cession or not. const. 2. 14. C. 8. 41.

(*f*) const. 1. C. 8. 18. "Qui pignus secundo loco accepit, ita jus suum confirmare potest, *si priori creditori debitam pecuniam solverit*, aut quum obtulisset, isque accipere noluisset, *eam obsignavit et deposuit*, nec in usus suos convertit."—const. 5. C. ibid. "Prior quidem creditor compelli non potest tibi, qui posteriore loco pignus accepisti, debitum offerre, *sed si tu illi id omne, quod debetur, solveris, pignoris tui causa firmabitur.*"—Comp. also const. 8. C. ibid.—fr. 11. § 4. fr. 16. D. 20. 4.—fr. 5. pr. D. 20. 5. (Marcianus) "Cum secundus creditor, *oblata priori pecunia*, in locum ejus successerit, venditionem ob pecuniam solutam et creditam recte facit."—const. 22. C. 8. 14.—const. 4. C. 8. 19. "Si prior respublica contraxit, fundusque ei est obligatus, *tibi secundo creditori offerenti pecuniam potestas est, ut succedas etiam in jus reipublicæ.*" —const. un. C. 8. 27.—*Berghoff* de successione hypothecaria. Gottingen, 1744.—*B. Becmann*, Diss. de successione creditoris in alterius et suum ipsius locum. Gottingen, 1781.—*Schulze*, Diss. de jure ejus cujus oblata pecunia creditores tempore anteriores dimittuntur. Celle, 1786.—*Haubold* de jure offerendi. Leipsic, 1793. and in his Opusc. Edited by Wenck. Vol. 1. p. 573.—*Glück*, Comm. Vol. 19. § 1097.—*Müller* in the Archiv Civ. Prax. Vol. 11. p. 385.—*Linde* in the Z. für Civ. R. u. Proc. Vol. 5. p. 290.—*Thibaut*, System. § 654.

and that there is no certain order of succession, no distinction being made as to whether the prior creditor who is paid off by a posterior mortgagee is one who immediately or mediately precedes him.[a] But in the latter case he of course succeeds to the superior rights of the discharged creditor only to the extent of the amount he has paid him; and the rights of the intermediate creditors are in no wise affected.[b] Again, a mortgagee of a still inferior rank may avail himself of this right of succession to another creditor's place, against the same creditor who has already exercised it against his superior;[c] on the other hand, it may also be enforced by a superior against an inferior mortgagee; and in case each of them should undertake at the same time to enforce it against the other, the superior has the preference over the inferior mortgagee.[d] On the contrary, it ceases altogether as soon as the thing is regularly sold by one of the prior mortgagees to a third party,[e] or when the judgment ordering its sale has obtained *the force* of law (*res judicata*), or when a commission of bankruptcy is issued against the debtor.[f] *

(*a*) See the passages cited in the last note, especially fr. 16. D. 20. 4.—*Gesterding*, Pfandr. § 39.—*Mühlenbruch*, Cession. p. 463. *Glück*, l. c. p. 362.—*Linde*, l. c. p. 292.—*Haubold*, l. c. and *Wenck* in his preface to Haubold's Opusc. p. 63. are of another opinion.

(*b*) fr. 16. D. 20. 4.

(*c*) fr. 5. § 1. D. 20. 5.

(*d*) *Pauli* Sent. rec. lib. 2. tit. 13. § 8. "Novissimus creditor priorem, oblata pecunia, quo possessio in eum transferatur, dimittere potest; *sed et prior creditor secundum creditorem, si voluerit, dimittere non prohibetur*, quamquam ipse in pignore potior sit." —const. 5. C. 8. 18.—Contra: *Glück*, l. c. p. 355.—*Zimmern* in the Z. für Civ. R. u. Proc. Vol. 1. p. 53.—*Linde*, l. c. p. 293. and Vol. 6. p. 215.—But on the other hand, see: *Müller* in the Archiv. Civ. Prax. Vol. 11. p. 386. and his Civ. Abh. Vol. 1. No. 2.—*Schunck's* Jahrb. Vol. 17. p. 113. Vol. 19. p. 118.—Comp. *Bopp* in Rosshirt's Zeitschrift. No. 3. art. 4.—*Fritz*, l. c. p. 526.—*Sintenis*, l. c. p. 123.

(*e*) fr. 3. pr. D. 20. 5. (Papinianus) "Cum prior creditor pignus jure conventionis vendidit, *secundo creditori non superesse jus offerendæ pecuniæ convenit.*"—const. 1. C. 8. 20.

(*f*) *Mevii* Decis. P. 4. p. 158.—Comp. *Braun*, Erört. l. c.

* We have to remark, in addition to what our Author has said respecting the *jus offerendi*, that this right, as it must be evident, was originally introduced for the benefit of posterior mortgagees, in order to furnish them with a means of checking the prior mortgagees. A posterior creditor may procure for himself the place of any prior mortgagee, by paying off his claim; whether the mortgage of the latter be a legal or conventional, a simple or privileged, a general or special one. Taking the Civil law system of mortgage as it is, none can fail to perceive that under this system such a right must have been highly valuable and important to the posterior creditors. In the first place, it afforded one who was in possession, the means of retaining the thing pledged as against a prior creditor who demanded its surrender for the satisfaction of his claim. In the second place, a posterior creditor might thereby protect his mortgage on a special thing (e. g. the debtor's dwelling-house or shop), where the whole of the debtor's estate stands pledged to a prior creditor, and when the latter intends to proceed against this special thing first. In the third place, a posterior creditor may thereby secure to himself the right of selling the thing mortgaged, without being vetoed by the prior creditor; which may be of considerable importance to him, as for instance, when he is in need of the money he has loaned on its security, or when a postponement of the sale would endanger the safety of his money. And lastly, he can thereby prevent another creditor from selling the mortgaged property, if his interests should require it.

III. Actions of the Mortgagee.

A. Petitory.[a]

§ 358. The actions arising out of the right of pawn or mortgage are partly petitory and partly possessory. The petitory action of the pawnee and mortgagee for enforcing their rights, is the *actio hypothecaria*.[b] 1. This action was originally granted only to the lessor of a *prædium rusticum*, on account of the *invecta et illata* conventionally pledged to him to secure the payment of the rent, and was called *actio Serviana*; it was subsequently granted by way of analogy to every pawnee and mortgagee, as an *actio quasi Serviana s. hypothecaria* for enforcing their rights of pawn and mortgage.[c] 2. It applies against every possessor of the thing pledged, whether it be the debtor himself or a third party, excepting him only who has a mortgage on it superior to that of the plaintiff.[d] If the creditor brings this action against the pledgor or his heirs, or against a third possessor who derives his right from the pledgor, he has to produce evidence of the debt and of the fact of pledging;[e] but if he brings the action against a third possessor who does not derive his right from the pledgor, he has also to prove that the pledgor was proprietor of the thing at the time the pledge was given, or else that he had a right to pledge it. Where the creditor is unable or unwilling to prove any thing more than a *bonæ fidei possessio* of the pledgor, he can enforce his right of pledge by means of the *actio Publiciana*; and he is always entitled to this action as far as the pledgor himself could use it for enforcing his rights in the thing.[f] 3. The *actio hypothecaria* is directed to the enforcement of the right of mortgage; and consequently its aim is, to secure a sur-

(*a*) Dig. 13. 7.—Cod. 8. 33.—*Löhr* in his Mag. Vol. 3. No. 4.—*Glück*, Comm. Vol. 18. p. 309 seqq. (Comp. *Du Roi* in the Archiv Civ. Prax. Vol. 6. p. 399.)—*Gesterding*, Pfandrecht. § 46–50.—*Schweppe*, Röm. Priv. R. Vol. 2. § 304–357.—*Büchel*, Natur des Pfandrechts. p. 4–24. 87 seqq.

(*b*) § 7. J. 4. 6. It is sometimes called *pignoratitia in rem actio*. fr. 41. D. 13. 7.—fr. 3. § 3. D. 10. 4. (Ulpianus) "Est autem personalis hæc actio, et ei competit, qui in rem acturus est *qualicunque in rem actione*, etiam pignoratitia Serviana sive *hypothecaria*, quæ creditoribus competit."—fr. 7. § 12. D. 10. 3. (Idem) "Inter eos, qui pignori acceperunt, talis divisio fieri debet, ut non vero pretio æstimetur pars, sed in tantum duntaxat, quantum pro ea parte debetur, et assignetur quidem pignus uni ex creditoribus, licentia tamen non denegetur debitori debitum offerre, et pignus suum luere. Idemque dicitur, et si possessor pignoris litis æstimationem *pignoratitia in rem agenti* offerat."—fr. 19. D. 44. 2. (Marcellus) "Duobus diversis temporibus eandem rem pignori dedit; egit posterior cum priore *pignoratitia*, et obtinuit; mox ille agere simili actione instituit. Quæsitum est: an exceptio rei judicatæ obstaret? Respondit: si opposuerit exceptionem rei sibi ante pignoratæ, et nihil aliud novum et validum adjecerit, sine dubio obstabit: eandem enim quæstionem revocat in judicium." —Comp. fr. 11. § 10. D. ibid.—And sometimes it is termed *vindicatio pignoris*. fr. 16. § 3. D. 20. 1.

(*c*) § 7. J. 4. 6.—const. 1. C. 6. 43.

(*d*) fr. 12. pr. § 7. D. 20. 4.—const. 14. 18. C. 8. 14.

(*e*) fr. 21. § 1. D. 20. 1.—fr. 13. § 1 D. 16. 1. —fr. 30. § 1. in fin. D. 44. 2. (See thereon: *Francke*, Civ. Abh. p. 112.)—const. 10. C. 4. 24.—const. 15. C. 8. 14.—const. 1. C. 8. 33.

(*f*) fr. 23. D. 22. 3.—fr. 3. pr. fr. 28. D. 20. 1.—arg. fr. 9. § 4. D. 6. 2.—fr. 14. D. 20. 4.

render of the thing mortgaged to satisfy the plaintiff's claims.* 4. A third possessor of the thing, when he is sued by the *actio hypothecaria*, can require the creditor first to sue the debtor and his sureties (s. c. *beneficium excussionis personale*);[b] he can also free himself from the action, and accordingly from any obligation to surrender the thing, by satisfying the plaintiff's claims.[c] 5. When the thing claimed has been only generally, and another thing has at the same time been specially pledged, the defendant has a right to require that the plaintiff should proceed first against the thing specially pledged (s. c. *beneficium excussionis reale*).[d] 6. The action may be brought against the debtor or his heirs at any time within forty years, and within the same period

(*a*) fr. 16. § 3. 4. fr. 17. pr. fr. 21. § 3. D. 20. 1.

(*b*) Nov. 4. c. 2. "Sed *neque ad res debitorum, si ab aliis delineantur, prius veniat, quam actionibus personalibus contra mandatores et fidejussores et constituentes expertus fuerit.* Ac cum ita ad res debitoris principalis ab aliis detentas venerit, earumque detentores convenerit, si nec inde illi satisfactum sit, tunc res fidejussorum et mandatorum et constituentium persequatur. Idem erit dicendum, si hi omnes quosdam sibi obligatos habeant, quique hypothecariis actionibus teneri possint. In debitorem tamen principalem atque res apud ipsum existentes (sive personalibus, sive hypothecariis, sive ambabus actionibus statim uti voluerit) omnem licentiam ei damus, prædictam a nobis rationem et ordinem in reliquis quoque personis et casibus lege constituentes. Neque hoc solum de creditoribus dicimus, verum etiam si quis emerit quid ab aliquo, et confirmatorem, ut vocant, acceperit, et venditio, actione contra venditorem instituta, aliquatenus labefactetur, non statim confirmatorem emtor conveniat, neque eum, qui ex rebus venditoris quid detinet, sed primo venditorem, deinde confirmatorem, et tertio loco detentorem. Eademque distinctio et in præsentibus, et in absentibus etiam hic adhibeatur, quam antea tum in fidejussoribus, mandatoribus et constituentibus, tum etiam in debitoribus sancivimus. Atque id similiter in aliis quoque contractibus obtineat, in quibus fidejussores aliqui, aut mandatores, aut *constituentes* accipiuntur, et tam in ipsis principalibus ab utraque parte, quam heredibus eorum et successoribus. Antiqua igitur lex in his rursus valeat, subditosque nostros hac justitia atque distinctione foveat."—const. 14. C. 4. 10. "*Est in arbitrio vestro*, personali debitoris heredes actione, an eum, qui ab his distracta sibique tradita pignora tenet, in rem Serviana, si non longi temporis præscriptione munitus sit, an utrosque conveniatis."—const. 14. C. 8. 14. (quoted above, p. 384. note *e*.)—const. 24. C. ibid. "Persecutione pignoris omissa, debitores actione personali convenire creditor *urgeri non potest*."—Comp. Nov. 112. c. 1.

(*c*) fr. 16. § 3. D. 20. 1.—fr. 12. § 1. D. 20. 6. —const. 19. C. 4. 32.

(*d*) const. 9. C. 8. 28.—const. 2. C. 8. 14. (quoted above, p. 375. note *c*.)—*It is not* settled whether this exception belongs only to the pledgor and other pledgees, or also to a third possessor of the thing pledged. The common opinion however gives it also to the latter.—*Koch* de beneficio excussionis tertio hypothecæ specialis possessori competente. Gies-

* A mortgagee who is obliged to sue his debtor, will best secure himself by uniting to the *actio hypothecaria* the action given for the principal obligation, e. g. the *actio mutui*, when the debt arises from a money loan; or the *actio locati conducti*, when it arises from a contract of letting and hiring (*cumulatio actionum alternativa*). In such case the request (*petitum*) which the plaintiff has to address to the court (at the end of his libel) will consist in this: *ut reus debitum solvat vel rem tradat* (that the defendant shall pay the debt or deliver up the thing pledged). But where a mortgagee brings the *actio hypothecaria* against a third possessor, he cannot resort to this cumulation: for here he sues the latter only in virtue of his real right in the thing; and consequently he can require nothing more than that the possessor shall surrender the thing to him for his satisfaction, and not that he shall pay the debt, since the third possessor is not personally obliged to him. Still, according to the established usage, a libel in which the plaintiff makes such an alternative application against a third possessor will be sustained (*Schaumburg*, Annott. ad Struvii Jurisprud. for. p. 557.); and this appears reasonable, inasmuch as the possessor is entitled by law to avoid the surrender of the thing by satisfying the creditor's claims.

against a third possessor who holds the thing as a *pledge*, provided the debtor be still living; for after the debtor's death, the action against such third possessor lasts either thirty or forty years, according as he takes into account the years of his possession during the debtor's lifetime or not (§ 201). When, however, the third party possesses the thing as his *property*, the action against him becomes extinct in thirty years, unless it be extinguished still earlier, in consequence of his having acquired the thing by prescription.[a]

B. Possessory.

§ 359. To the possessory remedies of the pledgee belong: 1. The ordinary *interdicta retinendæ et recuperandæ possessionis* for the protection of his possession of the thing pledged. These of course belong only to the pawnee; because such a one alone has juridical possession of the thing pledged.[b] 2. The *interdictum Salvianum:* this is an *interdictum adipiscendæ possessionis*, which originally, like the *actio Serviana*, belonged only to the lessor of a *prædium rusticum;* in order that when the rent was not paid at the proper time, he might demand immediate possession of the things conventionally pledged to him by the tenant.[c] It was afterwards granted also by way of analogy to every other mortgagee (*interdictum quasi Salvianum*).[d] According to the older law, it applied against every possessor of the things mortgaged; but by the later law it can be employed only against the mortgagor.[e] 3. The

sen, 1771.—*Weber*, Versuche. p. 117.—Contra: *Hepp* in the Archiv Civ. Prax. Vol. 9. p. 370.—But on the other hand, see: *Zimmern* in the *Z.* für Civ. R. u. Proc. Vol. 1. p. 47.

(*a*) const. 7. pr. § 1. 2. and const. 8. pr. § 1. C. 7. 39. taken in connexion with const. 1. 2. C. 7. 36.—*Löhr* in the Archiv Civ. Prax. Vol. 10. p. 82.—*C. G. Biener*, Interpret. et respons. cap. 35. Leipsic, 1828.; and in his Opusc. Edited by F. A. Biener. Vol. 2. No. 113.—*Unterholzner*, Verjährungslehre. Vol. 2. § 249.

(*b*) fr. 1. § 9. D. 43. 16.—fr. 16. D. 41. 3. (quoted above, § 232. note *b*.)—fr. 3. § 15. D. 10. 4. (quoted p. 243. note *a*.). See above, § 349.

(*c*) *Gaius*, 4. 147. "Interdictum quoque, quod appellatur Salvianum, adipiscendæ possessionis causa comparatum est, eoque utitur dominus fundi de rebus coloni, quas is pro mercedibus fundi pignori futuras pepigisset."—§ 3. J. 4. 15. and *Theophilus* on the same.—fr. 1. pr. D. 43. 33. (Julianus) "Si colonus ancillam in fundum pignoris nomine induxerit, et eam vendiderit, quod apud emtorem ex ea natum est, ejus apprehendendi gratia utile interdictum reddi oportet. § 1. Si colonus res in fundum duorum pignoris nomine intulerit, ita ut utrique in solidum obligatæ essent, *singuli adversus extraneos Salviano interdicto recte experientur*; inter ipsos vero si reddatur hoc interdictum, possidentis conditio melior erit. At si id actum fuerit, ut pro partibus res obligaretur, utilis actio et adversus extraneos, et inter ipsos dari debebit, per quam dimidias partes possessionis singuli apprehendant." — *Gesterding*, Pfandrecht. § 51.—*Huschke*, Studien des R. R. Breslau, 1830. No. 4.—*Puchta*, Klagen. § 126.

(*d*) const. 1. C. 8. 9. "Si te non remittente pignus debitor tuus ea, quæ tibi obnoxia sunt, venumdedit, integrum tibi jus est, ea persequi, non *interdicto Salviano* (*id enim tantummodo adversus conductorem debitoremve competit*), sed Serviana actione, vel quæ ad exemplum ejus instituitur, utilis adversus emtorem exercenda est." Comp. § 7. J. 4. 6.—Contra: *Wening*, Civ. R. Vol. 1. § 183.—*Zimmern* in the *Z.* für Civ. R. u. Proc. Vol. 1. p. 54. and in the Archiv Civ. Prax. Vol. 11. p. 345.—*Huschke*, l. c. p. 351 seqq.—But see, on the other hand: *Thibaut* in the Archiv Civ. Prax. Vol. 11. p. 123.

(*e*) fr. 1. pr. § 1. D. 43. 33. (quoted above, note *c*.)—const. 1. C. 8. 9. (quoted note *d*.)—*Gesterding*, l. c.—Contra: *Hering*, Diss. de Salviano interdicto utili adversus quemcunque rerum oppignoratarum possessorem com-

interdictum ne vis fiat ei qui in possessionem missus est, which belonged to him who had obtained a prætorian immission, and was unlawfully prevented from taking possession. Its aim was to obtain compensation for the damage sustained.[a]

TITLE FOURTH.

EXTINCTION OF MORTGAGES.[b]

I. From General Causes.

§ 360. A pawn or mortgage becomes extinct from general causes: 1. When the thing pledged perishes,[c] or when it becomes so changed that it is neither any longer the same thing, nor can become so again (§ 265).[d] 2. When a confusion of ownership and right of pledge occurs in the same person, i. e. when the pledgor of the thing becomes heir of the pledgee, or when the pledgee becomes proprietor of the thing pledged.[e] 3. When it was given only for a certain period, and this period has

petente. Frankfort on the Oder, 1750. — *Wening*, l. c. and *Zimmern*, l. c.—*Mühlenbruch*, Doctr. Pand. § 427.—*Thibaut*, l. c.—*Huschke*, l. c. p. 378. is of opinion that, according to the later law, it applies at least against a third possessor who derives his right from the pledgor.

(*a*) Dig. 43. 4.—Comp. § 184. No. 5. and § 344.

(*b*) Dig. 20. 6.—Cod. VIII. 26. 31.—*Gesterding*, Pfandrecht. § 41-45.—Comp. *Story* on Bailm. 2d Ed. § 359 seqq.

(*c*) fr. 8. pr. D. 20. 6. (Marcianus) "Sicut re corporali extincta, ita et usufructu extincto *pignus hypothecave perit.*"—const. 25. C. 8. 14. "Servo, qui fuerat pignori obligatus, defuncto, *debiti permanet integra petitio.*"—If the thing is afterwards restored, the pawn or mortgage is thereby revived. fr. 29. § 2. D. 20. 1. (Paulus) "Domus pignori data exusta est, *eamque aream emit Lucius Titius, et exstruxit.* Quæsitum est de jure pignoris. Paulus respondit: *pignoris persecutionem perseverare, et ideo jus soli superficiem secutam videri, id est cum jure pignoris*; sed bonæ fidei possessores non aliter cogendos creditoribus ædificium restituere, quam sumtus in exstructionem erogatos, quatenus pretiosior res facta est, reciperent."—fr. 35 D. ibid. (Labeo) "Si insula, quam tibi ex pacto convento licuit vendere, combusta est, *deinde a debitore tuo restituta, idem in nova insula juris habes.*"—Comp. *Story*, l. c. § 339.

(*d*) fr. 18. § 3. D. 13. 7. (Paulus) "Si quis caverit, ut silva sibi pignori esset, *navem ex ea materia factam non esse pignori*, Cassius ait, quia aliud sit materia, aliud navis; et ideo nominatim in dando pignore adjiciendum esse ait: *quæque ex silva facta natave sint.*"—The pawn or mortgage is not affected by any mere change which the thing undergoes. fr. 16. § 2. D. 20. 1. (Marcianus) "Si res hypothecæ data postea mutata fuerit, æque hypothecaria actio competit, veluti de *domo* data hypothecæ et *horreo* ‖ horto ‖ facta, item si de *loco* convenit, et *domus* facta sit, item de *loco dato*, deinde vineis in eo positis."—*Gesterding*, l. c.

(*e*) fr. 29. D. 13. 7. (quoted above, p. 370. note *a*.)—fr. 9. pr. D. 20. 6.—fr. 30. § 1. in fin. D. 44. 2. (Paulus) "In proposita autem quæstione magis me illud movet, numquid pignoris jus extinctum sit dominio acquisito? *Neque enim potest pignus perseverare domino constituto creditore*; actio tamen pignoraticia competit; verum est enim, et pignori datam, et satisfactum non esse. Quare puto, non obstare rei judicatæ exceptionem."—*Francke*, Civ. Abh. p. 112 seqq.—*Bückel*, Natur des Pfandrechts. p. 85 seqq.—One who purchases a thing mortgaged to several creditors under the condition that he shall take the place of a prior creditor to be paid off by the purchase money, can (although he is now owner of the thing) exercise all the rights against the posterior creditors which formerly belonged to the prior creditor whom he succeeds; but on the other hand, he must allow the posterior creditors to exercise the jus offerendi against himself.—const. 3. C. 8. 19. (quoted p. 392. note *c*.)—const. 1. C. 8. 20.—fr. 17. D. 20. 4. (quoted p. 392. note *c*.)—fr. 6. D. 20. 5. (Modestinus) "Cum posterior creditor a priore pignus emit, non tam acquirendi dominii, quam servandi pignoris sui causa intelligitur pecuniam dedisse, *et ideo offerri ei a debitore potest.*"—Comp. the writings cited above, p. 370. note *a*.

expired.[a] 4. When it was granted by one who from the beginning had only a revocable right in the thing, and his right has terminated.[b] 5. When the pledgee renounces it;[c] and hence, for instance, when he causes a surety or other security to be given him *instead of* the pledge.[d] The creditor is considered to have made a tacit renunciation when, before the debt is discharged, he returns the pledge or mortgage deed;[e] when he grants an express permission to the debtor, to sell the pledge;[f] and when, after he has been summoned *sub pœna præclusionis*, he does not announce and prosecute his right within the time appointed by the court.[g] 6. Lastly, the pledge is extinguished when a third party acquires the thing pledged as free property by prescription.[h]

(*a*) fr. 6. pr. D. 20. 6. (Ulpianus) "Item liberatur pignus, sive solutum est debitum, sive eo nomine satisfactum est. *Sed et si tempore finitum pignus est, idem dicere debemus*, vel si qua ratione obligatio ejus finita est."

(*b*) fr. 3. D. ibid. and fr. 31. D. 20. 1. (both quoted p. 271. note *a*.)—fr. 4. § 3. D. 18. 2.—*Fritz* in the Archiv Civ. Prax. Vol. 8. p. 286. Hence the so-called *subpignus* becomes extinct with the expiration of the right of the original pledgee. fr. 40. § 2. D. 13. 7. (Papinianus) "Soluta pecunia creditor possessionem pignoris, quæ corporalis apud eum fuit, restituere debet, nec quidquam amplius præstare cogitur. Itaque si medio tempore pignus creditor pignori dederit, domino solvente pecuniam, quam debuit, *secundi pignoris neque persecutio dabitur*, neque retentio relinquetur."—const. 1. C. 8. 24.

(*c*) fr. 8. § 1. D. 20. 6.—Cod. 8. 26.—*Quistorp*, Beiträge. No. 22.

(*d*) fr. 5. § 2. fr. 6. § 2. fr. 14. D. 20. 6.—fr. 9. § 3. D. 13. 7.—arg. const. 8. C. 8. 42.—*Vermehren* in the Archiv Civ. Prax. Vol. 13. p. 42.

(*e*) const. 7. C. 8. 26.—fr. 1. § 1. D. 34. 3. (Ulpianus) "Julianus scripsit: *si res pignori data legetur debitori a creditore*, valere legatum, habereque eum actionem, ut pignus recipiat prius, quam pecuniam solvat. Sic autem loquitur Julianus, quasi debitum non debeat lucrari; sed si alia testantis voluntas fuit, et ad hoc pervenietur exemplo luitionis."—fr. 3. D. 2. 14. (Modestinus) "*Post pignus vero debitori redditum*, si pecunia soluta non fuerit, *debitum peti posse, dubium non est*; nisi specialiter contrarium actum esse probetur."—*Westphal*, Pfandrecht. § 237.

(*f*) fr. 4. § 1. fr. 7. pr. D. 20. 6.—fr. 12. D. ibid. (Paulus) "Paulus respondit: Sempronium antiquiorem creditorem consentientem, *quum debitor eandem rem tertio creditori obligaret, jus suum pignoris remisisse videri*, non etiam tertium in locum ejus successisse, et ideo mihi creditoris meliorem causam effectam. Idem observandum est, et si respublica tertio loco crediderit."—fr. 158. D. 50. 17.—const. 2. 11. C. 8. 26. Comp. fr. 4. § 2. fr. 8. § 15. D. 20. 6.—If the contemplated sale does not take place or is revoked, the right of pawn or mortgage continues. fr. 8. § 6. fr. 10. pr. D. 20. 6. And where the thing is really sold, but the debtor afterwards reacquires it, the pawn or mortgage revives, but it is then considered to be dated at the time of revival. const. 1. C. 8. 26.—*Vermehren*, l. c. p. 29.—Moreover where a pledgee merely consents to a further pledging of the thing, he does not thereby lose his right of pledge, but only his right of procedence. fr. 9. § 1. fr. 12. pr. D. 20. 6.—fr. 12. § 4. D. 20. 4.—*Vermehren*, l. c. p. 33.

(*g*) const. 6. C. 8. 26. "Si eo tempore, quo prædium distrahebatur, programmate admoniti creditores, quum præsentes essent, jus suum executi non sunt, *possunt videri obligationem pignoris amisisse*."

(*h*) fr. 12. D. 44. 3.—const. 1. 2. C. 7. 36.—const. 19. C. 8. 45. "Si obligata prædia venumdedisti, *et longi temporis præscriptione solita emtores se tueri possunt*, evictionis periculum timere non potes."—const. 7. C. 4. 10.—const. 8. pr. C. 7. 39. Neither the debtor nor his heirs can terminate the right of pledge by means of acquisitive prescription. fr. 1. § 2. D. 20. 1.—fr. 44. § 5. D. 41. 3. (Papinianus) "Non mutat usucapio superveniens pro emtore vel pro herede, quominus pignoris persecutio salva sit; ut enim ususfructus usucapi non potest, ita persecutio pignoris, quæ nulla societate dominio conjungitur, sed sola conventione constituitur, *usucapione rei non perimitur*."—const. 7. C. 8. 14. "*Usucapio* pignoris conventionem *non extinguit*."—On the contrary, the actio hypothecaria against them does not expire until 40 years have elapsed.—const. 7. § 1. C. 7. 39.—*Donelli*, Comm. jur. civ. Lib. 5. c. 29.—*Unterholzner*, Verjährung. p. 75. 293. 313. 418. and his Verjährungslehre. Vol. 1. § 10. Vol. 2. § 174. 249.—*Reinhardt*, Usucapio und præscriptio. § 87.—*Büchel*, Natur des Pfandrechts. p. 61–65.

II. From Peculiar Causes.

§ 361. A mortgage terminates according to its peculiar nature: 1. When the debt for which it was granted is wholly discharged,[a] or otherwise extinguished, as e. g. by confusion of the claim and debt in the same person.[b] 2. When the pledge is regularly sold by the creditor.[c] And especially, when a superior mortgagee sells the pledge, the mortgages of all the inferior creditors also become extinguished by the sale;[d] and whenever an heir, who has entered upon an inheritance under the legal benefit of an inventory (*sub beneficio inventarii*), disposes of the things belonging to the inheritance, all the former rights of mortgage in the same are thereby extinguished.[e]

(*a*) fr. 9. § 3–5. fr. 13. pr. D. 13. 7.—fr. 6. pr. D. 20. 6.—fr. 18. D. 46. 2.—const. 3. C. 8. 31. —*Weber*, Nat. Verb. § 1. 110. 111. Where the debt has been extinguished in part, the pawn or mortgage still holds good for the remainder. fr. 9. § 3. D. 13. 7.—const. 2. C. 8. 29. Hence also in the case where one of several co-heirs has paid only his share of the testator's debt.—const. 1. C. 8. 31. "Qui pro parte heres extitit, *nisi totum debitum exsolvat*, suam portionem ex pignoribus recipere non potest."—const. 2. C. 8. 32.—const. 16. C. 8. 28.—In like manner the pawn or mortgage continues while the natural obligation remains.—const. 2. C. 8. 31. "Intelligere debes, vincula pignoris durare personali actione submota." (See p. 371. note *b*.) As the Editor understands this passage, it means nothing more than this, that a pledge may subsist and continue to secure an obligation for which no action would lie (*obligatio naturalis*). It cannot by any means refer to the *exceptio extinctæ actionis*; for at the time when Gordian issued this ordinance, the *præscriptio actionum* had not been introduced. Comp. the Editor's note. p. 205. This construction of const. 2. C. here adopted is supported by many distinguished civilians.–Contra: Weber, l. c. § 92.

(*b*) fr. 75. fr. 95. § 2. fr. 107. D. 46. 3. compared with fr. 43. ibid.—*Höpfner*, Comm. § 720.

(*c*) Cod. 8. 30.—Comp. the Ed.'s note. p. 386.

(*d*) const. 1. C. 8. 20.—*Huber*, Præl. p. 1071 seqq.

(*e*) const. 22. § 8. C. 6. 30.–*Thibaut*, Syst. § 725.

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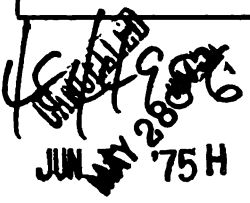

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